1180

No. 3205

United States Circuit Court of Appeals

For the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, Inc., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

FILED
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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Southern Division.

DEPT. No. ——.

TWENTY ONE MINING COMPANY, a Corporation,

Plaintiff,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Defendant.

Complaint.

Now comes the plaintiff in the above-entitled action, and for cause of action against said defendant, alleges:

I.

That plaintiff now is, and at all times herein stated, has been a corporation organized and existing under and by virtue of the laws of the State of Arizona, having its principal place of business in the city of Phoenix in said State, and doing business in Sierra County, State of California, by virtue of compliance with the laws of the last mentioned State.

II.

That the defendant, Original Sixteen-To-One Mine, Inc., now is, and at all times herein stated, has been a corporation organized and existing under and by virtue of the laws of the State of California.

III.

That this plaintiff is now, and at all times hereinafter stated, has been a citizen and resident of the

State of Arizona, and that the defendant now is and at all times hereinafter [1*] stated, has been a resident and citizen of the State of California.

IV.

That the matter in dispute in this action, exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000) Dollars.

V.

That there is involved in this action, the construction of a statute of the United States.

VI.

That plaintiff now is, and at all times herein stated, has been the owner and entitled to the possession, and in the actual possession of the Valentine Quartz Lode Mining Claim, situated in Sierra County, State of California, and described as follows:

"BEGINNING at Corner No. 1, a pine post 4 feet long, set in the ground with mound of stone, scribed V-1-5128-0-7-4640, a pine 6 inches in diameter bears North 12° East 19.70 feet, a pine 6 inches in diameter bears North 63° West 27.50 feet, each blazed and scribed V-1-5128-B T., from which the South quarter of Section corner of Section 34, Township 19 North, Range 10 East, M. D. M. bears South 4° 36′ West 863.47 feet.

Thence North 1° 51′ East 254.47 feet to corner No. 2, said corner being identical with corner No. 6 of the Belmont Lode hereinafter described.

Thence North 31° 9′ West 246.47 feet to cor-

*Page-number appearing at foot of page of original certified Transcript of Record.

ner No. 3, a post set in the ground with mound of stone scribed V-3-5128.

Thence North 62° 48′ East 1.68 feet to corner No. 4, a post set in the ground with mound of stone scribed V-4-5128.

Thence South 56° 33′ East 457.62 feet to corner No. 5, a post set in the ground with mound of stone scribed V-5-5128- E. Q. M. [2]

Thence South 59° 15′ East 82 feet to corner No. 6, a post set in the ground with mound of stone scribed V-6-5128-0-6-4640.

Thence South 62° 48′ West 375.95 feet to corner No. 1, the place of beginning."

VII.

That the plaintiff now is, and at all times hereinafter stated, has been the owner of, and entitled to the possession and in the actual possession of the Belmont Quartz Lode Mining Claim, situated in the County of Sierra, State of California, and described as follows:

"BEGINNING at a pine post 4 feet long, set in the ground with mound of stone scribed B-1-5128 and being corner No. 1, from which a pine tree 18 inches in diameter bears 8.20° W. 16.25 feet and another pine 18 inches in diameter bears N. 13° W. 3 feet, each blazed and scribed B-1-5128-B T., from which the South quarter section corner of Section 34, Township 19 North, Range 10 East, M. D. M., bears South 3° 49′ W. 557.72 feet.

Thence North 31° 44′ W. 139.55 feet to corner No. 2, a pine post set in the ground with

mound of stone scribed B-2-Tx-4-5128-15-1-3-5104.

Thence North 53° 4′ East, 20.40 feet to corner No. 3, a post set in the ground with mound of stone scribed B-3-5128.

Thence North 51° 41′ West 623.20 feet to corner No. 4. (This corner is in the center of the Alleghany-Nevada City Road, and no permanent post is set.)

Thence North 60° 49′ East, 523.43 feet to corner No. 5, a post 4 feet long set in the ground with mound of stone scribed B-5-5128-c-2-4717.

Thence South 31° 9′ East, 249.97 feet to corner No. 6, a post set in the ground with mound of stone scribed B-6-V-2-5128.

Thence South 1° 51′ West 546.17 feet to corner No. 7, a post set in the ground with [3] mound of stone scribed B-7-5128.

Thence South 60° 49′ West 25.96 feet to corner No. 1, the place of beginning.''

VIII.

That underneath the surface of said Belmont and Valentine Quartz Lode Mining Claims, and within the surface boundaries of said claims dropped downward perpendicularly, there exists a valuable vein of quartz, rock and earth in place, containing valuable minerals; that this plaintiff in good faith, heretofore claimed, and still claims the ownership of said vein as a part and portion of said Belmont Mining Claim, but that the District Court of the United States, Ninth Circuit, for the Northern District of California, Southern Division, heretofore rendered

a decree in a certain suit therein pending, in which the defendant herein was plaintiff, and plaintiff herein was a defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's mining location and claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein, has not as yet expired and said decree has not become final; that during the pendency of the suit in which said decree was entered, an injunction was issued restraining the defendant herein from working or mining on said vein beneath the surface of said Belmont and Valentine Mining Claims, but by said decree, such injunction was dissolved, and this plaintiff has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein be continued during said appeal.

That by and under the terms of said decree heretofore [4] referred to, the said defendant claims the right to work and mine the said vein at any and all points beneath the surface of said Belmont and Valentine Quartz Lode Mining Claims, and threatens to, and will commence the working of extracting and removing the ores from said vein immediately.

IX.

Plaintiff further alleges that the said defendant in the further working and mining of said vein beneath the surface of said Belmont and Valentine Quartz Lode Mining Claims, will excavate and remove rock and earth therefrom and create large and

extensive openings underneath the surface thereof, and entirely outside the limits or boundaries of said vein.

X.

Plaintiff further alleges that in order that the said vein be worked by said defendant underneath the surface of said Belmont and Valentine Claims speedily, and without the expenditure of large amounts of money which would be necessary to perform said mining and work within the limits of said vein, said defendant will go outside the boundaries and limits of said vein and commit great and irreparable injury and damage upon said claims underneath the surface thereof, by digging up, excavating and removing quartz, rock and earth therein.

XI.

Plaintiff further alleges that defendant, unless restrained by this Court, will, in its further workings and mining of said vein underneath the surface of said Belmont and Valentine Claims, enter upon said claims and each of them underneath the surface thereof at points outside and beyond the limits and boundaries of said vein and dig up, excavate and remove large [5] quantities of earth and rock which are now the substance of said claims, to the great and irreparable injury to plaintiff.

Plaintiff alleges that it has no plain, adequate or complete remedy at law.

WHEREFORE, plaintiff prays that an injunction issue out of this Court directed to said defendant, Original Sixteen-To-One Mine, Inc., restraining it and its agents, servants, employees and confed-

erates, and each of them, from entering into or upon any part or portion of the said Belmont and Valentine Mining Claims, or any part thereof, outside the limits or boundaries of said vein hereinabove described, and from digging up, excavating or removing any of the quartz, rock or earth therein, outside the said limits or boundaries of said vein in or underneath the surface of said Belmont and Valentine Mining Claims, or either of them; that a restraining order be issued to the same effect until an application for such injunction can be made under the rules and practice of this court; that plaintiff be granted a decree perpetually enjoining said defendant, its agents, servants, employees and confederates, and each of them, from entering into or upon any part of the said Belmont and Valentine Quartz Lode Mining Claims, or either of them, and from digging up, excavating or removing any of the quartz, rock or earth therein, which is outside of the boundaries or limits of said vein, as hereinabove described; for costs of suit, and for such other and further relief as may seem meet and just.

FRANK R. WEHE,
BERT SCHLESINGER,
JNO. B. CLAYBERG,
Attorneys for Plaintiff. [6]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Joseph H. Hunt, being first duly sworn, deposes and says:

I am an officer of the corporation, Twenty-One

Mining Company, plaintiff named in the foregoing complaint, to wit: President thereof, and I make this affidavit in behalf of said plaintiff.

I have read the foregoing bill of complaint and know the contents thereof; the same is true of my own knowledge, except as to such matters and things as are therein stated upon information or belief, and as to such matters I believe it to be true.

(Signed) JOSEPH H. HUNT.

Subscribed and sworn to before me this 25th day of June, 1918.

[Seal] JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 26, 1918. Walter B. Maling, Clerk. [7]

[Title of Court and Cause.]

Answer.

The defendant in the above-entitled action by way of answer to the complaint on file herein admits, denies and alleges as follows:

I.

Admits that plaintiff is a corporation, as more fully set forth in paragraph I of said complaint.

II.

Admits that plaintiff is a corporation, as more fully set forth in paragraph II of said complaint.

III.

Admits that diversity of citizenship as alleged in paragraphs II of said complaint.

IV.

Denies that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of $3,000 and on the other hand alleges that the matter in dispute in this action, has a value far less than the sum of $3,000.

V.

Denies that there is involved in this action the construction of a statute of the United States, but alleges [8] that the statute in question is plain on its face and that the questions involved in this action are merely the application of said plain and unambiguous statute to the particular facts in question.

VI.

Defendant alleges that it has neither information nor belief sufficient to enable it to answer that portion of paragraph VI of said complaint where it is alleged that plaintiff is the owner of the Valentine quartz lode mining claim therein described, and basing its denial upon that ground it denies that plaintiff is or was at the times mentioned in said complaint the owner of said claim; and defendant alleges that it is informed and believes and basing its denial upon such information and belief denies that plaintiff is or was at all the times mentioned in said complaint entitled to the possession or in the actual possession of said Valentine quartz mining claim, or any portion thereof, and basing its allegation upon such information and belief alleges that the Valentine Mines Company is entitled to the possession and is in the actual possession of said claim.

VII.

Defendant alleges that it has neither information nor belief sufficient to enable it to answer that portion of paragraph VI of said complaint where it is alleged that plaintiff is the owner of the Belmont Quartz Lode Mining claim therein described, and basing its denial upon that ground it denies that plaintiff is or was at the time mentioned in said complaint the owner of said claim; and defendant alleges that it is informed and believes and basing [9] its denial upon such information and belief denies that plaintiff is or was at all the times mentioned in said complaint entitled to the possession or in the actual possession of said Belmont quartz mining claim, or any portion thereof, and basing its allegation upon such information and belief alleges that the Valentine Mines Company is entitled to the possession and is in the actual possession of said claim.

VIII.

Defendant admits that at all the times mentioned in said complaint and there now is underneath the surface of what plaintiff claims to be is Belmont and Valentine quartz lode mining claims and within the surface boundaries of said claims extended downward vertically there exists a valuable vein of quartz, rock and earth in place containing valuable minerals, and denies that plaintiff has now or at any of the times mentioned in said complaint, any claim or right to, or ownership of said vein or any part or portion thereof, and defendant admits that this District Court has heretofore rendered a decree in a certain suit therein pending, Equity No. 292, in

which the defendant herein was plaintiff, and plaintiff herein was a defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's Sixteen to One mining location and claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein has not yet expired and said decree has not become final in the sense that an appeal may yet be taken therefrom; that during the pendency of the suit in which the decree was entered an injunction was issued [10] restraining the defendant herein from working or mining on said vein beneath the surface of its alleged Belmont and Valentine mining claims; that by said decree such injunction was dissolved and defendant denies that this plaintiff has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein be continued during an appeal, if an appeal be taken; but, on the other hand, defendant alleges that said decree became final for the purposes of appeal on or about the first day of June, 1918, when an order was entered denying a petition for a new trial and a motion to vacate said decree, and defendant further alleges that plaintiff has had ample time within which to take an appeal and take the necessary proceedings for an application for an order that said injunction against this defendant be renewed during such appeal.

Defendant admits that under and by virtue of the terms of said decree, this defendant claims the right to work and mine the said vein at any and all points

VII.

Defendant alleges that it has neither information nor belief sufficient to enable it to answer that portion of paragraph VI of said complaint where it is alleged that plaintiff is the owner of the Belmont Quartz Lode Mining claim therein described, and basing its denial upon that ground it denies that plaintiff is or was at the time mentioned in said complaint the owner of said claim; and defendant alleges that it is informed and believes and basing [9] its denial upon such information and belief denies that plaintiff is or was at all the times mentioned in said complaint entitled to the possession or in the actual possession of said Belmont quartz mining claim, or any portion thereof, and basing its allegation upon such information and belief alleges that the Valentine Mines Company is entitled to the possession and is in the actual possession of said claim.

VIII.

Defendant admits that at all the times mentioned in said complaint and there now is underneath the surface of what plaintiff claims to be is Belmont and Valentine quartz lode mining claims and within the surface boundaries of said claims extended downward vertically there exists a valuable vein of quartz, rock and earth in place containing valuable minerals, and denies that plaintiff has now or at any of the times mentioned in said complaint, any claim or right to, or ownership of said vein or any part or portion thereof, and defendant admits that this District Court has heretofore rendered a decree in a certain suit therein pending, Equity No. 292, in

which the defendant herein was plaintiff, and plaintiff herein was a defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's Sixteen to One mining location and claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein has not yet expired and said decree has not become final in the sense that an appeal may yet be taken therefrom; that during the pendency of the suit in which the decree was entered an injunction was issued [10] restraining the defendant herein from working or mining on said vein beneath the surface of its alleged Belmont and Valentine mining claims; that by said decree such injunction was dissolved and defendant denies that this plaintiff has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein be continued during an appeal, if an appeal be taken; but, on the other hand, defendant alleges that said decree became final for the purposes of appeal on or about the first day of June, 1918, when an order was entered denying a petition for a new trial and a motion to vacate said decree, and defendant further alleges that plaintiff has had ample time within which to take an appeal and take the necessary proceedings for an application for an order that said injunction against this defendant be renewed during such appeal.

Defendant admits that under and by virtue of the terms of said decree, this defendant claims the right to work and mine the said vein at any and all points

beneath the surface of said alleged Belmont and Valentine Quartz mining claim, and defendant admits that it has already commenced the work of extracting and removing the ores from said vein and is now engaged in so doing.

IX.

Defendant denies that in the further working of said vein beneath the surface of said alleged Valentine and Belmont quartz mining claims, it will excavate rock and earth therefrom, or create large or extensive openings beneath the surface thereof and entirely outside the limits or boundaries of said vein. But, on the other hand, defendant [11] alleges that in the mining of said vein beneath the surface of said alleged claims that it will strictly keep within the rights granted to it by the mining statutes which permits it to pursue said vein extralaterally, and that in the mining of said vein it has not heretofore and will not in any respect exceed the rights granted it by said statute and confirmed by said decree.

X.

Defendant admits that if it be compelled to follow all the sinuousities, curvatures and variations of said vein and construct its work accordingly and be compelled to depart from the running of straight workings, such as are customary, proper and reasonable in the conduct of mining operations that it could not work said vein without the expenditure of large amounts of money which will be necessary to perform said mining and work within the strict and technical limits and wall boundaries of said vein; but defendant denies that by going outside of the

boundaries and limits of said vein to the slight extent that is required by the reasonable, practical, customary, ordinary and common methods of mining, that it will commit great or irremediable or any injury or damage upon or to said claims underneath the surface thereof, or otherwise, by digging up or excavating or removing whatever quartz or rock or earth my be found in such workings; that no quartz of any value has been encountered in such workings or is likely to be, and that whatever quartz is and has been encountered is a part of the main vein found in small feeders and crevices, such as is commonly found in the country rock in the immediate vicinity of a main vein. [12]

XI.

Defendant further denies that it will, unless restrained by this court in its further workings and mining of said vein underneath the surface of said Belmont and Valentine claims, enter upon said claims, or either or them, or any portion thereof, at points outside and beyond the limits and boundaries of said vein and dig up or excavate or move large or any quantities of earth or rock which are now the substance of said claims to the great or irreparable, or any, injury whatsoever to plaintiff, and defendant alleges that it intends to remove such small quantities of barren and worthless country rock in the immediate vicinity of said vein in the walls thereof as may be necessary for the profitable and economic working of said vein and as may be reasonably necessary for such purposes and in accordance with the customs and usages of the art

and science of mining under similar circumstances. And this defendant assures this Honorable Court that it will use more than ordinary care and caution because of the unfounded complaint which has been made by the plaintiff herein and will keep within said vein and in the immediate vicinity thereof with its workings, so that there can be no possibility whatever of any legitimate charge made that defendant in the pursuit of its vein is or will exceed in any respect the lawful latitude allowed and granted to it by the mining statute and the said decree, herein referred to, confirming the same.

Defendant denies that plaintiff has no plain, adequate or complete remedy at law; but, on the other hand, alleges that plaintiff has a plain, adequate and complete [13] remedy at law and that equity should not take cognizance. [14]

As a further and separate answer and defense, this defendant alleges that to issue a temporary restraining order or a preliminary injunction in this matter as prayed for by plaintiff will result in great inconvenience and hardship to defendant and put it to great additional expense if it be compelled to follow the vein sinuosities and curvatures and variations and to handle its ores through such openings exclusively and be not permitted to conduct its mining operations in the ordinary and customary manner in entire accordance with the usages and customs of the modern art and science of mining as aforesaid, and depart from the vein to the very limited extent reasonably necessary and that to so restrain and enjoin this defendant will profit plaintiff noth-

ing and plaintiff if denied a restraining order and a preliminary injunction will suffer no hardship nor inconvenience nor damage irreparable or otherwise, whatsoever; [26] that the relative inconvenience that will be caused each party hereto by the granting or withholding of an injunction or restraining order will be utterly one-sided and disproportionate and would operate most inequitably against this defendant to its great pecuniary loss and would render the right to pursue its vein extralaterally beneath said Belmont and Valentine surface granted to it by the federal mining statute and confirmed by said decree of this court of greatly diminished value whereas on the other hand the plaintiff will suffer no damage whatever by reason of any acts of this defendant either past, present, or contemplated.

WHEREFORE, defendant prays that this Honorable Court enter a decree confirming its right to mine said vein through all reasonably necessary workings and defining the same and that in said decree it be adjudged that this defendant has not in the past exceeded its rights incident to the mining of said vein as aforesaid nor violated nor infringed on nor interfered with any right of plaintiff arising by virtue of its alleged ownership of said Belmont and Valentine mining claims or otherwise.

W. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendant. [27]

State of California,
City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn on his oath says:

That he is an officer of the defendant company herein, to wit: its vice-president; that he has read the foregoing answer and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

S. B. CONNOR.

Subscribed and sworn to before me this 28th day of June, 1918.

[Seal] MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires, Aug. 19, 1919.

[Endorsed]: Service by copy of within "Answer" admitted this 28th day of June, 1918. F. R. Wehe, Bert Schlesinger, Jno. B. Clayberg. Filed Jun. 28, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

[Title of Court and Cause.]

Statement of Proceedings or Bill of Exceptions.

PLAINTIFF'S STATEMENT OR BILL OF EXCEPTIONS ON APPLICATION FOR PRELIMINARY INJUNCTION.

BE IT REMEMBERED that the above-named

plaintiff heretofore and on or about the 26th day of June, 1918, filed in the above Court and Cause its certain complaint against the above-named defendant.

That on or about the same day plaintiff filed in said Court and Cause the affidavit of Frank L. Sizer in support of an application for a preliminary injunction against said defendant, which affidavit is in words and figures following:

(Title of Court and Cause.)

(Venue)

Affidavit of Frank L. Sizer in Support of Application for Preliminary Injunction.

Frank L. Sizer being duly sworn on his oath, says:

That he is a mining engineer, and is familiar with the properties known as the Sixteen to One Mining Claim, the Belmont Mining Claim and the Valentine Mining Claim; that he is also familiar with the underground workings and excavations beneath the Belmont and Valentine Mining Claims heretofore made by either or both parties to this suit, or by anyone claiming under them, or either of them; that underneath the surface of said Belmont and Valentine Mining Claims and within the surface boundaries of said claims dropped downward perpendicularly, there exists a valuable vein of quartz, rock and earth in place, containing valuable minerals; that the plaintiff in this action, has heretofore claimed, and still claims the ownership of said vein as a part

and portion of said Belmont Mining Claim, but that the District Court of the United States, Ninth Circuit, for the the Northern District of California, Southern Division, heretofore rendered a decree in a certain suit therein pending, in which the defendant herein was plaintiff, and plaintiff herein was a [29—1] defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's Sixteen to One Mining Claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein, has not as yet expired and said decree has not become final; that during the pendency of said suit in which said decree was entered, an injunction was entered, restraining the defendant herein from working or mining the said vein beneath the surface of the said Belmont and Valentine Mining Claims, but by said decree, said injunction was dissolved and plaintiff herein has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein, be continued during said appeal.

That it appears by said workings, that the defendant, Original Sixteen to One Mine, Inc., has heretofore in many instances, departed from the said vein so underlying the surface of the Belmont and Valentine Quartz Lode Mining Claims, and has heretofore and prior to the commencement of this suit, made the following excavations outside the boundaries of said vein above described, viz.: Under the Valentine, sinking a shaft for a distance of 105 feet

which is 6 feet by 12 feet in size; an incline raise 20 feet in length and 4 feet by 6 feet in size; under the Belmont Claim running a tunnel or cross-cut 230 feet long 4 by 6½ feet in size; a cross-cut 30 feet long 4 feet by 6 feet in size, and a cross-cut 20 feet long, 5 feet by 6 feet in size.

That S. B. Connor, vice-president of defendant Company has filed an affidavit in a certain suit pending in the United States District Court, Ninth Circuit, in and for the Northern District of California, Southern Division, in which the Original Sixteen to One Mine, Inc. (the defendant herein) is plaintiff and the Twenty-One Mining Company (plaintiff herein), is defendant, and in said affidavit said Connor states:

"That said affiant has had an experience extending over forty years in the development of mines and the running of mine workings and that it is the universal practice in following a vein either horizontally or on its inclination to drive such working on a more or less straight course rather than to follow all of the undulations and rolls of the actual vein so long as the working keeps in close touch with the vein; that it would be a practicable and economic impossibility to follow all the sinuosities of the vein and keep the working entirely within the vein, more especially in the sinking of an incline shaft and in the case of a working incline shaft a nearly straight course must be followed in order that the necessary track and working of hoisting, etc., can be carried on efficiently. Where the general course of the vein changes abruptly, a change of direction

in the shaft will naturally follow in order to keep in close touch with the vein. In sinking the incline shaft on the Sixteen to One Vein, the superintendent at the mine used his best judgment in following the vein, and that departure of the shaft from the vein is not greater than will be justified in economic and practical mining."

That William A. Simpkins, a Mining Engineer and a witness in behalf of defendant in the same action, as above stated, filed an affidavit for and on behalf of the defendant herein, in which said Simpkins stated: **[30—2]**

"Affiant further declares that it is the usual practice to run mine workings in or near the vein, and that where the vein has many undulations, it would be impracticable and uneconomic to follow all the variations of the vein, but the miner does the best he can."

That it appears from the testimony taken in the case above referred to, that the vein lying underneath the surface of said Valentine and Belmont Mining Claims, the apex to which is claimed by the defendant herein to be located in the Sixteen to One Mining Claim owned by the defendant, is undulating and waving in its character and of variable width, narrowing down in some instances to about two feet between the walls thereof, and in other places widening out to a width of over eight feet between its walls. That if the said defendant follows the practice in which it has heretofore been engaged, and follows the judgment of its superintendent Connors and Mining Engineer Simpkins, wherever there is an

undulation or wave in said vein, instead of following such undulation or wave, it will depart from said vein and excavate its tunnels, levels, cross-cuts, shafts, winzes, and upraises entirely outside of said vein, and in the country rock which is a part and portion of the substance of either the said Valentine Mine or the said Belmont Mining Claim.

That in and by a certain verified answer to a complaint filed herein in the Superior Court of the State of California, in and for the County of Sierra, for ejectment, in which plaintiff herein is plaintiff and defendant herein is defendant, and brought to recover the possession of the said excavations so heretofore made by said defendant beneath the surface of the Valentine and Belmont and other mining claims, it is admitted by the said defendant, that said defendant has made the excavations alleged in said complaint outside the boundaries of said vein, and underneath the surface of the said Valentine and Belmont Mining Claims, and claims and alleges that it had the right so to do, and that each and all of said excavations heretofore made by said defendant as hereinabove stated, except the cross-cut tunnel 230 feet long, 4 feet by 6 feet in size, were made for the sole purpose of following said vein lying underneath the surface of the said Valentine and Belmont Claims in its downward course, and to mine said ores and to excavate and remove the same to the surface, and were necessary, essential and proper for such purposes; that each and all of said excavations were necessary and incident to the proper and beneficial working of the said vein; that the same

and each thereof were incident, necessary, appurtenant and appendant to the right to mine ore from the said vein and constitute a reasonable exercise of such incident, accessory, appendant and appurtenant right, and are each and all necessary and essential for the reasonable, beneficial and profitable use and enjoyment of said defendant's property in the said vein and minerals therein; that the same and each of them were run in entire accordance with the principles and customs of modern mining as applied to the excavations of ore from veins similarly situated, and are reasonably necessary and incident to the profitable and beneficial working of said vein.

That the said Sixteen to One Mining Claim, the Belmont Mining Claim and the Valentine Mining Claim, are located and situated in Sierra County, State of California, at the distance [31—3] of about 190 miles from the City of San Francisco, and that it would require at least three days, after any representative of the plaintiff company at said mine, ascertained that the defendant in the pretended working and mining of said vein, had passed outside the boundaries thereof, and was working and excavating in the country rock beneath the surface of either the Valentine or Belmont Mining Claims, before a restraining order or an injunction could be applied for and issued and served upon said company by use of the utmost diligence, and before said restraining order or injunction could be applied for and be obtained and served, large quantities of the substance of the Belmont and Valentine Mining Claims could be broken down, extracted and removed

by the defendant in the continuation of its pretended mining and working of the said vein; that in the opinion and judgment of affiant, the said defendant might place many workmen and miners at many different levels underneath the surface of said Belmont or Valentine Mining Claims at points entirely outside of the vein above referred to, and that such men might excavate, break down and carry away large amounts of the substance of said Belmont and Valentine Mining Claims before this plaintiff, or any of its officers or employees, could be informed thereof, and before any proceedings could be instituted for obtaining an injunction against the defendant, restraining it from doing such work; that in many instances, work which the defendant deems important to its successful and economical working and mining of said vein, might be done by it entirely outside of the boundaries of said vein and beneath the surface of said Valentine and Belmont Mining Claims and be so completed and in the use of said defendant before this plaintiff, or any of its employees, had knowledge that such work was done or being done, and before this plaintiff could, by the exercise of the utmost diligence, apply for an injunction or restraining order against said defendant to prevent it from doing any work outside the boundaries of said vein.

That under the decree of the United States District Court, Ninth Circuit, in and for the Northern District of California, Southern Division, entered in the suit above mentioned, the defendant is now in possession of and working said vein, and in pos-

session of the said openings, and that the plaintiff and its agents, employees, workmen and officers are excluded therefrom, and that unless the defendant be enjoined from making any excavations outside the boundaries of said vein and beneath the surface of said Belmont and Valentine Mining Claims, the said defendant could and might make large excavations outside of said vein and destroy the substance of the said Belmont and Valentine Mining Claims, without any knowledge thereof being acquired by the plaintiff or any of its agents, officers, workmen or employees.

FRANK L. SIZER.

Subscribed and sworn to before me this 25th day of June, 1918.

JOHN E. MANDERS,
Notary Public in and for the City and County of San Francisco, State of California,

That on or about the 26th day of June, 1918, an Order [32—4] was duly made by the Honorable William H. Hunt one of the Judges of the United States Court of Appeals, Ninth Circuit, which order provided that the defendant in this action to wit: ORIGINAL SIXTEEN TO ONE MINE, INC., should show cause before this Court on Friday, July 5th, 1918, at the Courtroom of this Court in the post-office building, city and county of San Francisco, State of California at the hour of 10 o'clock in the forenoon of said day or as soon thereafter as counsel could be heard, as to why preliminary injunction prayed for should not issue; that said order further provided that the defendant herein Original Sixteen

To One Mine, Inc., should be restrained from doing or performing the acts complained of until said order to show cause had been heard and decided a true copy of said order is as follows:—

(Title of Court and Cause.)

On reading and filing the verified complaint of the plaintiff in the above-entitled action, praying for a preliminary injunction against the above-named defendant, restraning it and its officers, agents, servants and employees and each of them, from entering into or upon any part or portion of the Belmont and Valentine Quartz Lode Mining Claims outside the limits and boundaries of that certain vein lying beneath the surface of said claims and described in said complaint, and from digging up, excavating or removing any rock or earth outside the limits or boundaries of said vein, in or underneath the surface of said Belmont and Valentine Mining Claims, or either of them; and on reading the affidavit of Frank L. Sizer in support of the issuance of such injunction, and on motion of John B. Clayberg, one of the solicitors for plaintiff, it is hereby

ORDERED, that said defendant, Original Sixteen-To-One Mine, Inc. show cause, if any it has, before one of the Judges of **[33—5]** this court, at the courtroom of this court, Department No. 2 in the Post Office Building, in the City and County of San Francisco, State of California, on the 5th day of July, 1918, at the hour of Ten o'clock in the forenoon of said day, why said injunction should not be granted, and in the meantime, it is hereby,

ORDERED, that said defendants, its agents, servants and employees and each of them, be restrained from doing any of the acts above mentioned, until the hearing of said order to show cause; it is further

ORDERED, that the plaintiff may, upon the hearing of said order to show cause, present such other or further affidavits as it may desire, in support of the issuance of said injunction provided that copies of the same are served upon the defendant at least 8 days before said hearing; and it is further

ORDERED, that a copy of said complaint and affidavit and this order be served upon said defendant at least 5 days before the said 5th day of July 1918.

Dated June 26, 1918.

WM. H. HUNT,
Judge.

THAT thereafter to wit on the First day of July 1918, the attorneys for said plaintiff, after said defendant had given notice of a motion to dissolve said restraining order, confessed in open Court that said restraining order had been improperly issued and should be dissolved, and the same was thereupon dissolved by this Court.

THAT on or about the 28th day of June 1918 the defendant herein filed in said Court and cause its verified answer to said complaint.

THAT on the same day the defendant filed in said Court and Cause the affidavit of S. B. Connor, which is as follows: **[34—6]**

(Title of Court and Cause.)
(Venue.)

Affidavit of S. B. Connor.

S. B. Connor, being first duly sworn, deposes and says: that he is a mining engineer and is vice-president of the defendant corporation; that he has for many years been familiar with the Sixteen to One Mine and workings thereof; that he has read the Bill of Complaint in the above-entitled cause and the affidavit of Frank L. Sizer filed therein and is familiar with the contents of each thereof. That this District Court, through the Honorable Frank H. Rudkin, a Judge thereof, heretofore entered a decree in a certain suit pending therein, whereby this defendant was awarded the right to all of the vein found in the workings of both plaintiff and defendant beneath the surface of the Belmont and Valentine Mining Claims and between vertical planes passed through the Southerly end line of the Sixteen to One claim and a point 770 feet Northerly from said Southerly end line, and plaintiff in that suit, the defendant in this, was awarded the right to follow said vein on its downward course indefinitely and beneath said Belmont and Valentine claims.

That said right to mine said vein on its dip carries with it the necessary and incidental right of prosecuting all workings which are reasonably necessary for the purpose of extracting the contents of said vein; that in its mining the defendant herein has used absolute good faith in making only such excavations as are reasonably necessary for the purpose

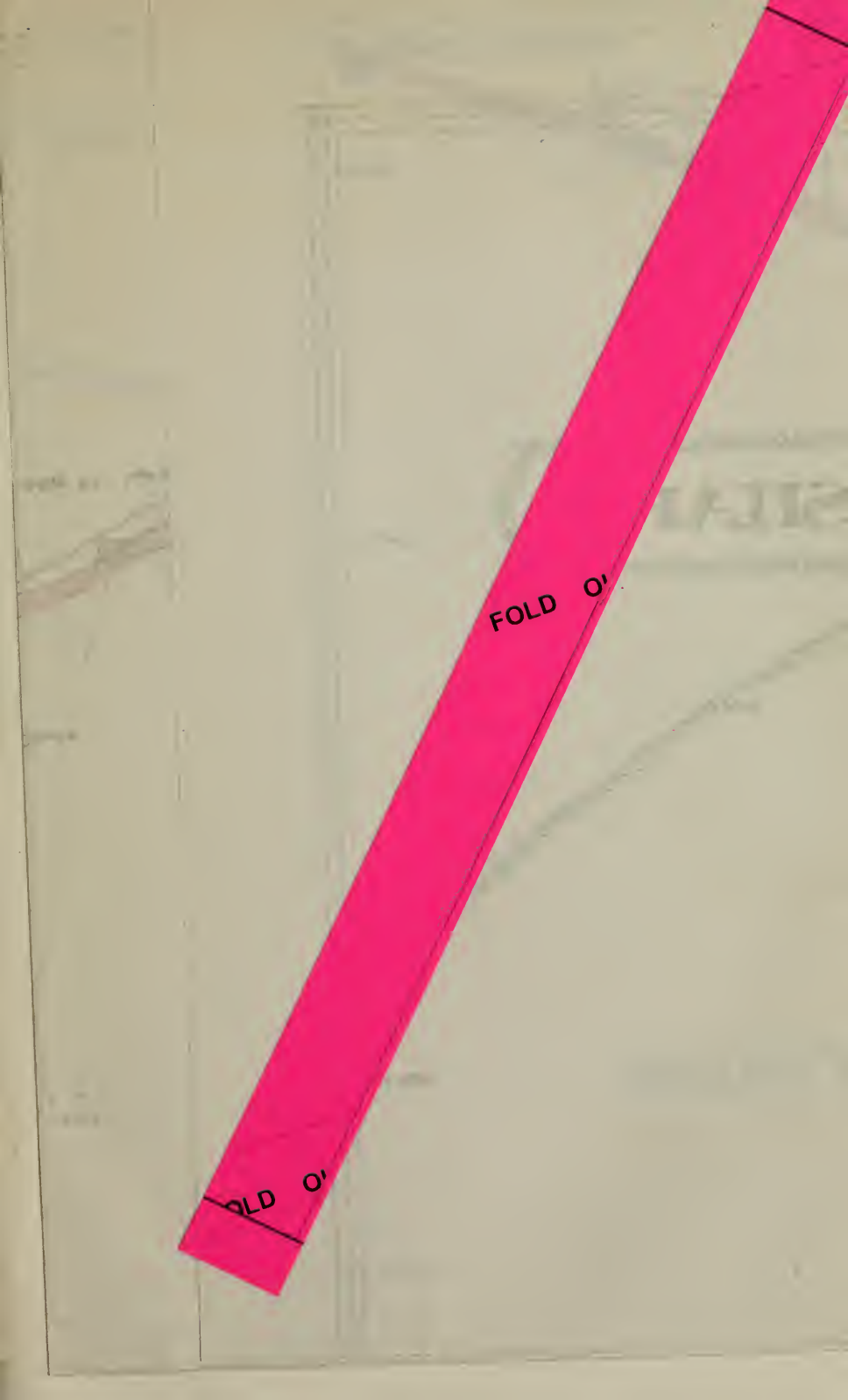
of following said vein on its downward course and extracting the ore therefrom and enjoying the benefit thereof, and that with one exception the workings described on page 2 of said affidavit of said Sizer are each and all reasonably necessary for the purposes aforesaid.

The one exception is the tunnel or crosscut 230 feet long, running underneath the surface of the Belmont Claim. This tunnel was run under a former management upwards of five years ago. It was run under a mistaken belief by the then management of the Company that it had a right to run said tunnel; that defendant was advised upwards of two years ago by its attorneys that it had no such right, and in the litigation pending between these parties just referred to, in which the said decree was rendered, it was admitted by defendant that it had made a mistake in running said crosscut, claimed no right thereto, and it has not for a long time past made any claim thereto adverse to the plaintiff herein; that the segment of shaft described on page 2 of said Sizer affidavit, as being underneath the Valentine Claim, is at all places in close touch with said vein, being not more than fifteen or twenty feet distant therefrom at any point, and at its lower end is rapidly approaching said vein again so that in the course of a short distance it will encounter said vein; that said shaft was run beneath said vein for said distance since it is the main working shaft of the Sixteen to One claim and was so run in order to keep the same comparatively straight since as straight a course as possible is essential for the economic work

of hoisting, etc., in a main working shaft, and it would be, from the standpoint of economic mining, an impossibility for said shaft to follow all the curvatures and undulations of said vein which varies in dip and strike in comparatively short distances, and is also frequently faulted; that these faults have almost invariably resulted in the lower segment of vein below the fault being found lower than it would **[35—7]** normally be if it followed its regular dip, and this was one of the main reasons which induced the management of the defendant to run said shaft immediately under said vein so that if it were faulted again as it had been repeatedly in the workings just above that the vein would more easily be picked up in the shaft on its extension downward. That to run said shaft immediately under said vein and in the foot wall is a common mining practice, for the foot wall in the Sixteen to One is composed of more solid material and requires less timbering and the ore can be worked more profitably than if said shaft should be run down on said vein. That the incline raise 20 feet in length, described in said Sizer affidavit as being found beneath the surface of the said Belmont Claim is for the purpose of reaching said vein. That said workings described in said Sizer affidavit as existing beneath the surface of the Belmont Claim, with the exception of the 230 foot tunnel or crosscut consist of two small workings which form an ore pocket and shoot in the vicinity of the 300 foot level of said shaft and is reasonably necessary for the economic and profitable working of said Sixteen to One mine and the vein above described.

That each and all of said workings are in hard country rock, many hundred feet beneath the surface of the Belmont and Valentine claims, with no vein or veins or ore, or ore minerals, of any character found or disclosed therein; that said workings have caused said plaintiff no damage whatsoever and their financial and pecuniary loss by reason of said workings would not amount to anything. That this defendant has no intention and will not depart from said vein in the prosecution of its work to any greater extent than herein specified and with the utmost good faith it has every intention of confining its workings in the future as closely as possible to said vein consistent with economic and profitable mining and in accordance with the usages and customs of the art and science of mining.

On page 6 of said affidavit of said Sizer he sets forth a hypothetical case as to what might be done if defendant should place many workmen and miners at different levels in the Sixteen to One workings underneath the Belmont and Valentine claims and that such men might excavate and carry away large amounts of the Belmont and Valentine claims; that the condition pictured by said Sizer is highly imaginative, visionary, impracticable, would serve no useful purpose and is beyond any thought or plan of this defendant; that it is affiant's belief that said statement was inserted in said affidavit without any foundation of fact as far as the intentions or opportunities of this defendant are concerned to do the acts and things there mentioned; and said statement was inserted in said affidavit for the sole purpose of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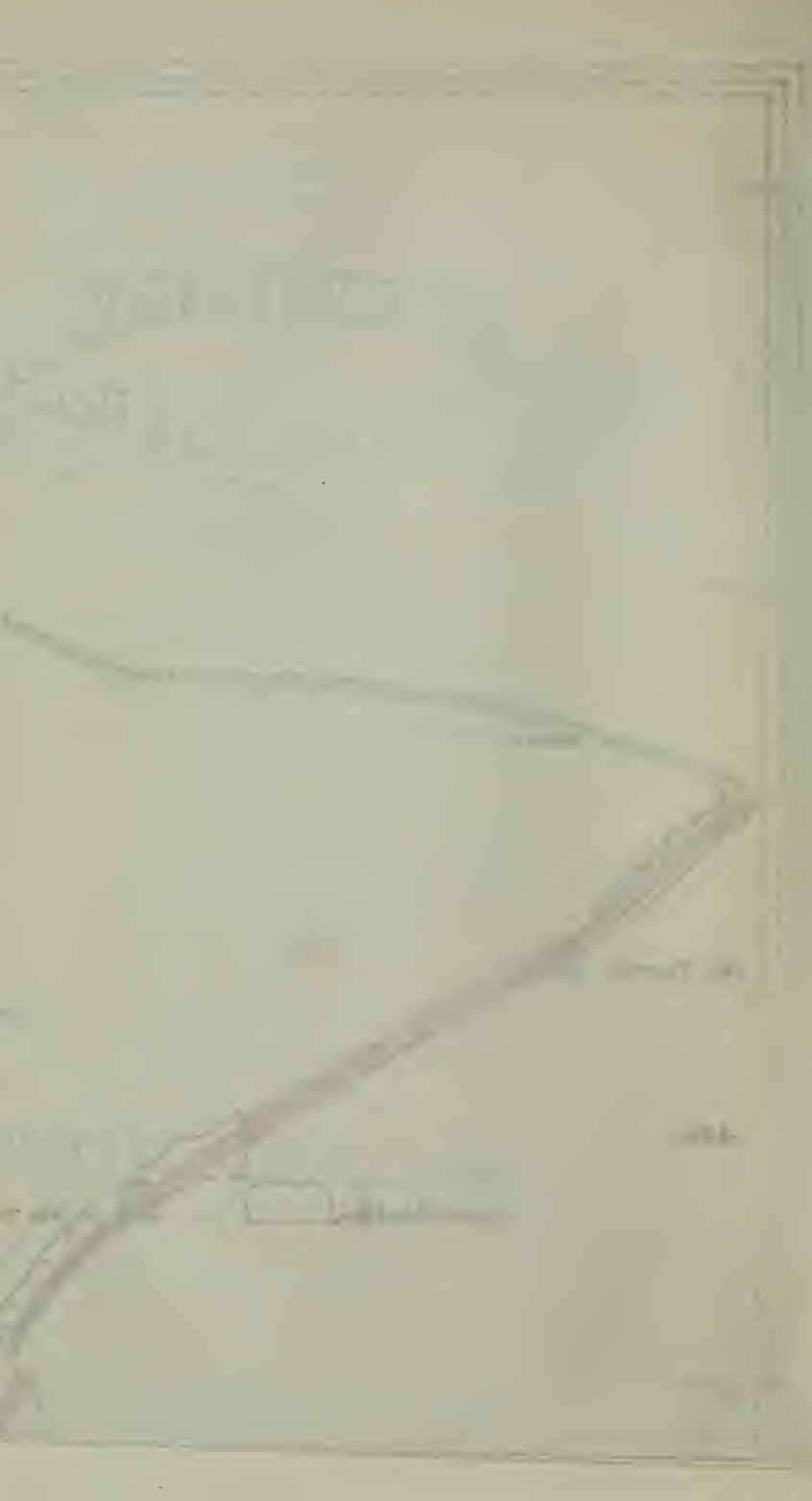

inducing this Court to believe that irremediable damage to plaintiff was contemplated by defendant and was possible when such is not the fact; that it will be impossible under existing conditions for defendant to get many workmen and miners, which it has no intention or desire to do, and there would be no object in penetrating the country rock as there set forth, and defendant has never threatened or contemplated or intended doing anything of the sort, and it would be impossible within the brief space of time that would intervene between an application for a preliminary injunction and the hearing for any irremedial damage to be done to plaintiff. **[36—8]**

That at the time plaintiff's counsel applied to this Honorable Court for a restraining order they well knew that defendant's counsel were in the City and County of San Francisco and could have been reached on the telephone within a very few minutes' time and could have appeared before this Honorable Court to show cause why said restraining order should not be issued.

That plaintiff in this action on May 25, 1918, filed an action in ejectment against the defendant herein in the Superior Court of the County of Sierra, State of California, for the purpose of recovering possession of the identical workings mentioned on page 2 of said Sizer affidavit and for damages for withholding the same; that said action is still pending in said Superior Court and said plaintiff has a complete and adequate remedy at law for the injuries complained of.

That a petition for rehearing and motion to vacate

the decree was made in the Equity suit pending before this Court and that the Judge thereof, the Honorable Frank H. Rudkin, denied both said petition for rehearing and said motion to set aside said decree, and the same was entered of record on June 1, 1918, and defendant in said action, the plaintiff in this, has had ever since said date in which to take an appeal and apply for supersedeas, and with reasonable diligence he could have done so.

That in pursuance of said decree above referred to and in accordance with its terms an injunction has issued out of this Honorable Court directed to the plaintiff herein and its agents, etc., enjoining them "from in any manner hindering or obstructing plaintiff (therein the defendant here) from working and mining said vein, etc." and that the object of this suit and the securing by this plaintiff of this restraining order is, as this affiant verily believes, to interfere with and hinder and obstruct and prevent this defendant from working and mining said vein, decreed to be its property as aforesaid and is an attempt to render said decree and said right to work said vein so awarded to this defendant, practically void and worthless.

S. B. CONNOR.

Subscribed and sworn to before me this 27th day of June, 1918.

[Seal] MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

THAT pursuant to adjournment the said order to show cause came on for hearing before this Court on

the 15th day of July, 1918, the application being based upon said complaint and the said affidavit of Frank L. Sizer; that upon the hearing of the matter, counsel for plaintiff, in response to an inquiry **[37—9]** from the court, stated that the sole question involved and presented for determination was whether in mining the Sixteen to One vein extralaterally underneath the surface of plaintiff's claims, the defendant was confined to working entirely within the walls of its vein or whether it had the right to cut into the country rock on either side of the vein, were necessary for its mining operations, either to keep its workings straight or regular, as is customary in such operations, where the vein undulates or changes in direction or where the vein narrows down to a width less than the convenient and ordinary width of the usual mining operations; plaintiff's contention being that the right of the plaintiff was confined to operations entirely within the walls of its vein and that those walls could not be transgressed, no matter how narrow the space. That upon this statement, the Court, without hearing from counsel for defendant, stated that it did not think the plaintiff's proposition could be sustained and that the application for a preliminary injunction would have to be denied; whereupon counsel for the defendant requested permission of the court to file affidavits in reply to the showing made by plaintiff in order that they might be used in the event that the plaintiff should appeal from the order denying the application, and permission to file the same was thereupon granted and the affidavits herein-

after set forth were thereupon filed by defendant, with leave to plaintiff within five days to file reply affidavit, should it be so advised. That thereupon the court caused to be entered its order denying said application, which order is in words and figures as follows:

(Title of Court and Cause.)

> "Plaintiff's application for a preliminary injunction came on to be heard and after argument being submitted and fully considered, it is ordered **[38—9½]** that said application be and the same is hereby denied";

To which ruling and order the plaintiff thereupon duly entered its exception.

The following are the affidavits filed on behalf of defendant, as above recited, to which no reply affidavits have been filed, viz.:

(Title of Court and Cause.)
(Venue.)

Affidavit of Thomas A. Gill.

Thomas A. Gill, being first duly sworn, deposes and says: that he is a resident of Nevada City, Nevada County, California, of the age of thirty-seven years, and a miner by occupation. That he has been actively engaged in mining for more than twenty-one years, as a miner, shift-boss, and for more than seven years last past as a general mine foreman. That for six years he has been and now is acting in the capacity of foreman for the North

Star Mines Company at the Champion Mine, Nevada City Mining District.

That he knows the Sixteen to One Mine at Alleghany, Sierra County, California, and has been over and through the works repeatedly and is familiar with the underground workings thereof. That he has noted that the main working shaft on said property is driven on the vein for a short distance and after crossing through faulted zone passes into the foot-wall and continues at a distance of from one to twenty feet under the vein at a constant grade or pitch and gradually flattening out in depth.

That in his opinion it was reasonably necessary to drive such shaft in the position in which it now is in reference to the vein. That it is of the utmost importance to keep the main working shaft of the mine on a constant grade or pitch and that it would be highly inadvisable and poor mining to **[39—10]** follow the broken and wavy course of the vein with the shaft which constitutes the main artery of the mine. That this practice is by no means uncommon in developing mines and it is often found necessary to depart even further than was done in this case.

Affiant further avers that he has seen instances of this practice in other mines throughout the state. That the shaft of the Empire Mines and Investment Company's mine at Grass Valley, California begins on the vein and is driven into the foot-wall in order to keep the shaft at a constant pitch. That another example may be seen in the Omaha Mine at Grass Valley, California where the main

working shaft departs from the vein and is driven into the foot-wall.

Affiant further avers that in his opinion it was advisable to pursue this course at the SIXTEEN–TO–ONE Mine. The vein has repeated faults, in every one of which the faulted segment is dropped into the foot-wall. That it is safer and cheaper to follow thru country rock at a short distance beneath the vein than to attempt to follow the undulations and faults of the vein.

Affiant further avers that he has noted the short cross cut into the hanging wall at the 300-foot level and the chute leading therefrom down to the main working shaft. That this chute was reasonably necessary to the working of the mine and that it is a common practice to cut such ore chutes for the purpose of storing and loading ore onto the skips in the shaft. That these chutes and ore pockets are found in every mine thruout the district cut into the hanging wall or the country rock.

That it is his opinion based on years of experience that the workings of the SIXTEEN–TO–ONE Mine cut into the country rock are reasonably necessary for the safe and efficient working of the said mine.

THOMAS A. GILL.

(Duly verified.)

(Title of Court and Cause.)

Affidavit of Elisha Hampton.

Elisha Hampton, being first duly sworn deposes and says: That he is a resident of Nevada City,

Nevada County, California, of the age of sixty-six (66) years, and a miner by occupation. That he has been actively engaged in mining for more than fifty years last past, and that for more than half of that time he has been engaged as an underground superintendent, general superintendent, or manager of mines. That he worked at the Federal Loan, Live Yankee, Brunswick and Summit Mines in Nevada County.

That he managed the Oneida and Bunker Hill Mines in Amador County for about thirteen years and that he was superintendent of the Seven Hundred Claim on Douglas Island for about two and one-half years. That he was general superintendent of the Goldfield Consolidated Mining Company at Goldfield, Nevada for two years. That practically all of his experience has been confined to quartz mining in deep mines.

That he has had experience in reading and interpreting maps and that he has seen a map of the underground workings of the SIXTEEN–TO–ONE Mine, situated at Alleghany, Sierra County, California. That he has noted that the main working shaft of said mine crosses thru a faulted zone on the vein and follows in the foot-wall thereof at a distance varying from one to twenty feet, beneath the vein. That said shaft maintains a constant pitch, gradually flattening out in depth. That there have been [40—11] raises driven thru to the vein at intervals.

Affiant avers that this course of driving a shaft into the foot-wall beneath the vein and following a course approximately parallel thereto is considered

good practice and commonly done in mining. That it is of the utmost importance to keep the main working shaft of a mine on a constant and uniform grade or pitch. That it is advisable to depart from the course of the vein when found necessary to keep the shaft straight. That this practice tends to efficiency and safety in extracting and removing the ore. That in this case it appears that the vein has faulted and broken and that in his opinion it would be dangerous and highly inadvisable to carry the main working shaft along the course of the vein. That where the vein is broken or where the country rock is softer but more uniform it is good mining practice to sink in the foot-wall. That affiant has seen many examples of this. The Onieda Original Shaft in Amador County started on the vein but when the vein flattened out in depth it was found advisable to drive the shaft into the foot-wall in order to maintain a constant pitch. That the Bunker Hill shaft in the same county was started on the vein but affiant deemed it advisable to drive into the foot-wall, gradually flattening out in depth.

That the shaft at the Fremont and at the Keystone, both in Amador County were likewise begun on the vein and then driven into the foot, gradually flattening out in depth.

Affiant avers that in his opinion it was highly advisable and necessary to drive the main working shaft of the SIXTEEN–TO–ONE Mine into the foot-wall as was done in this case and that such course is in accordance with the customs of good mining.

Affiant further avers that he noted a short cross

cut driven into the hanging wall at the three-hundred-foot level and a chute leading therefrom into the main working shaft of the SIXTEEN-TO-ONE. That he has been informed that such cross cut and chute is used for the purpose of storing and loading ore on to the skips in the shaft. That in his opinion it was necessary and advisable in this instance to make such an ore pocket and chute. That he has frequently found it necessary in carrying on mining operations to cut into the country rock for the purpose of obtaining storing and loading facilities. That such a practice is considered good mining and quite frequently resorted to. That it is advisable to have the chutes on sufficient grade or pitch so that the cars may be loaded by gravity and that where the pitch of the vein is flatter than 45° it is customary to cut into the hanging-wall and make the chute steeper. That in this instance it is his opinion that such an ore pocket and chute was reasonably necessary to the convenient and proper working of the mine in accordance with the customs of good mining.

ELISHA HAMPTON.

(Duly verified.)

(Title of Court and Cause.)

Counter-Affidavit of Andrew C. Lawson.

(Venue.)

Andrew C. Lawson, being first duly sworn, deposes and says: That he has been engaged in the study of geology and particularly economic geology

for upwards of 35 years last past, and has visited mines in various parts of the United States, Mexico, Canada, Alaska, Europe and Asia: that he is familiar with many of the gold quartz mines of the Sierra-Nevada; based on his observations made in these mines he states that it is common **[41—12]** mining practice to keep the various mine workings as straight as possible for economic reasons; that where a vein has undulations and rolls it would be impossible in many instances and highly impracticable from an economic standpoint to follow the vein with all its sinuosities and curvatures, and that it is almost invariable mining practice to follow along such a vein in a mean or average direction as nearly as possible. In addition to the actual openings on the vein itself, there are other openings which are reasonably necessary for operating purposes. A working run in the wall rock of a vein can usually be kept open with less expense because of the lesser amount of timbering required than a similar opening following the vein where the quartz is broken through so that the selvage or gouge of the vein is encountered, for this is usually a zone of weakness which requires additional support and for that reason is frequently not so satisfactory for a permanent working; where a vein is faulted, as is the case with the Sixteen to One vein with faults occurring at intervals, it is necessary in many instances to penetrate country rock in order to follow the faulted segment of the vein, and where the position of the vein upon each side of the fault is known, it is reasonable for the working to keep a mean position. That affiant is

familiar with the workings of the Sixteen to One Mine and with the main Sixteen to One Mine and with the main Sixteen to One shaft run immediately under the Sixteen to One vein throughout its lower extent, and also with the ore pocket and chute from the 300 ft. level, and in affiant's examination of other mines he has frequently found workings occupying a similar relation to the vein and that he considers the particular workings above referred to reasonably necessary for the operation of the Sixteen to One Mine from an economic standpoint and in entire accordance with the usuages and customs of modern mining as observed by him in other mines.

ANDREW C. LAWSON.

(Duly verified.)

(Title of Court and Cause.)

Counter-Affidavit of A. Werner Lawson.

(Venue.)

A. Werner Lawson being first duly sworn, deposes and says: that he is an economic geologist by profession, and has practiced his profession for several years last past and has visited mines in various parts of the western United States, with a view to studying and reporting on their economic development; that he has made an examination of the Sixteen to One Mine workings, situated in Sierra County, California. That the Sixteen to One vein, both on strike and dip, has many minor rolls and variation in directions and also varies greatly in width in various parts of the mine, and there is faulting in

places so that it would be a practicable impossibility as well as a great economic disadvantage to follow the vein in all its variations and changes in course and dip with the main working through which ore and waste has to be raised or conveyed on a track and in the lowering of timbers; that it is the invariable custom in economic mining to keep these major workings, especially the main working shaft of a mine following as straight and direct a course as is possible consistent with the position of the vein. It is a common mining practice to drive workings, especially permanent workings, immediately above or below the vein, especially where the country rock is hard and will stand without much timbering. It is also a universal mining custom to cut ore pockets, chutes, stations and other incidental **[42—13]** workings, into the country rock away from the vein for the purpose of working the mine in a practical and economic manner. Affiant is familiar with the ore pocket and chute run out from the 300 level in the Sixteen to One mine, and in affiant's opinion this working was run in accordance with common mining practice and is reasonably necessary for the economic and profitable operation of the mine. The same is true of the lower end of the main working shaft which is underneath the Valentine surface, and which is 10 or 15 feet below the vein. In the opinion of affiant the position of the shaft immediately below the vein is in accordance with good mining practice in view of the fact that the ore from the vein can be loaded through the chutes opening into the shaft directly into the skips by gravity, and

also for the purpose of keeping the shaft running in a more uniform grade. That these workings last mentioned are run in barren country rock and in affiant's opinion cannot occasion any possible financial injury to the surface owner of the Belmont and Valentine claims. And, on the other hand, if the Sixteen to One Company will be prevented from using such workings will result in great hardship and inconvenience and financial loss.

A. WERNER LAWSON.

(Duly verified.)

(Title of Court and Cause.)

Affidavit of M. C. Sullivan.

(Venue.)

M. C. Sullivan, being first duly sworn, deposes and says: that he is and has been for upwards of three years last past superintendent of the Sixteen to One Mine; that the ore chute underneath the Belmont surface and the lower extension of the Sixteen to One shaft underneath the Valentine surface were run under his direction; that said ore pocket and chute was constructed for the purpose of handling the ore extracted from the Sixteen to One vein in a reasonable and economic manner; that it is common mining practice to cut such ore chutes and pockets and other workings, such as stations in the immediate vicinity of the vein, and that said shaft below the Valentine surface was run beneath the vein in order to keep the shaft, which is the main working shaft

of the Sixteen to One Mine, as nearly straight as possible, and the departure from the vein to the slight extent there shown was for the purpose of getting into the solid wall rock immediately underneath the vein so that it will require less timbering and would stand better as a permanent working; the vein above in the upper workings had been faulted several times, the lower segment being dropped down each time, and this was an additional inducement for keeping under the vein, so that if it were faulted again in a similar manner this main working shaft through which all the hoisting operations would have to be performed would keep as near an average course as possible; in running said workings on and in the immediate vicinity of said vein, this affiant as superintendent has used the utmost good faith in trying to confine his operations as near to the vein itself as is reasonably practicable and possible; that no ore of any character has been encountered in any of said workings off the vein, but said workings have been run entirely in worthless and waste country rock, and cannot possibly have caused any detriment or damage or loss whatsoever to the owners of the surface of the Belmont and Valentine claims; that the workings above referred to are reasonably necessary in carrying on the mining operations on the Sixteen to One vein and are in accordance with common mining practice, and to confine such [43—14] workings to the vein itself would be a practicable impossibility and would seriously hamper the mining operations and cause an economic loss which would

be a great disadvantage to the Sixteen to One Company.

M. C. SULLIVAN.

(Duly verified.)

(Title of Court and Cause.)
(Venue.)

Affidavit of W. L. Williamson.

W. L. Williamson, being first duly sworn, deposes and says: That he is a resident of Nevada City, Nevada County, California, and a miner by occupation. That he has been engaged in mining for more than thirty years last past, and for more than fifteen years last past has been acting in the capacity of general foreman, underground superintendent, and general superintendent, of various mines throughout the States of California, Nevada, Arizona and Washington. That during such time he has had a continual experience with the operation, maintenance and exploitation of quartz mining in all its branches, and particularly with the underground workings thereof. That it has been part of his business to sink shafts, repair, and maintain the same. That he has engaged in such work at the Gaston Gold Mining Company's mine, at Gaston, Nevada County, California, as superintendent for more than four years and as underground superintendent for more than seven years. That he worked in a similar capacity in the Eureka Mine, Mohave County, Arizona, for several years, and at the Eureka Mine, Whatcom County, Washington, for about sixteen months. That at present he is acting as

superintendent for the Grass Valley Consolidated Gold Mining Company in operating the Allison Ranch Mine, Grass Valley, California.

Affiant further avers that he is familiar with map-reading, and has had a great deal of experience in that work. That he has examined a map of the underground workings of the Sixteen to One Mine, Alleghany Mining District, Sierra County, California, and has seen a representation of the position and extent of the main working shaft or winze of said mine, and has noted its relation to the vein throughout its entire length. That it appears from said map that the shaft has been driven underneath the vein at various places to a depth or distance from the latter varying from one to twenty feet. That raises have been driven at several places to connect with the vein and the stopes thereon. That the shaft maintains a constant grade or pitch, flattening out gradually in depth, while the vein appears to be irregular in its course, with undulations and frequent faulting. That the lower segments of said faulted vein appear to have dropped into the foot wall in several instances. In this connection, affiant avers that in his opinion based on years of experience in mining, it was not only advisable, but reasonable necessary to sink the shaft as has been done in this case. That it would be poor mining to confine the shaft to the walls of the vein, and not in accordance with the customs of mining in depth. That it is of the utmost importance to construct and maintain the main working shaft of a mine in manner as direct as possible, and with few variations in grade. It is im-

possible to extract and remove the ore with safety of efficiency where the main shaft follows the irregularities of the vein.

That in his experience he has found that it is not an unusual practice to follow this plan when the circumstances [44—15] require it. That affiant had occasion to follow an exactly similar plan at the Eureka Mine in Mohave County, Arizona, where the main working shaft was cut in to the foot wall at his direction, for the purpose of maintaining a constant grade. That the Allison Ranch Mine, Grass Valley, California, is operated through a shaft which begins on the west vein and cuts into the hanging wall in order to avoid the undulation of the vein.

Affiant further avers that such practice is further advisable where the foot wall of the vein is of softer material than the vein so that it may be mined more cheaply, or where the vein is irregular, faulted, and broken making it dangerous and difficult to keep open.

Affiant further avers that he has noted the ore pockets and chutes cut into the country rock, in immediate proximity of the vein and that it is his opinion that such work was and is reasonably necessary to facilitate the extraction of ore in accordance with the customs of good mining. That where the vein is small it is frequently necessary to cut into the foot wall to obtain sufficient room for storage and loading ore on to the skips, and that it is advisable and customary to make such cuts underneath the vein so that the loading may be done by gravity.

W. L. WILLIAMSON.

(Duly verified.)

(Title of Court and Cause.)

Counter-Affidavit of N. S. Kelsey.

(Venue.)

N. S. Kelsey, being first duly sworn, deposes and says: That he has for several years been connected with the management of the operations in the Argonaut Mine of Amador County, State of California, and is now the manager thereof; that he is familiar with other gold mines in the Sierras, State of California, and it is common mining practice to run the various workings of a mine, and particularly the shaft so as far as possible to strike a mean or average and keep the workings continuing as straight as possible for economic reasons; that if the shaft or other workings of a mine were to follow all the undulations and variations of the vein, the mine could not be worked practically, nor profitably, and that it is considered proper and ordinary mining to cut into the walls of the vein, especially where the vein is a narrow one, for the purpose of constructing ore pockets and chutes and stations; that such work can do no injury to the surface owner if it be in country rock and confined to the immediate vicinity of the vein; that the main shaft of the Argonaut Mine is some 4000 feet in depth on the incline, and in order to strike an average and avoid prohibitive expense it has been necessary to depart quite materially from the main vein in the lower portion of the shaft in passing underneath the surface of other mining claims and property which were at

the time of sinking such shaft in the ownership of other persons.

Affiant further states that he has examined a copy of the plat attached hereto, being a cross-section through the Sixteen to One shaft, and noted the ore pocket and chute extending from the 300 foot level underneath the surface of the Belmont claim and also the lower extension of the shaft underneath the Valentine claim and in his opinion as a practical mine manager the workings specified do not constitute an unreasonable departure from the vein which is colored in red on the attached plat, but are run in accordance with the common mining practice as aforesaid.

N. S. KELSEY.

(Duly verified.) [45—16]

IT IS HEREBY stipulated that the foregoing bill of exceptions and amendments may be approved, settled and signed by the Judge of said court as a true and correct bill of exceptions upon the hearing of said application for an injunction.

Dated this 12th day of August, 1918.

FRANK R. WEHE,
BERT SCHLESSINGER,
JNO. B. CLAYBERG,
Attorneys for Plaintiffs.
WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendants.

Order Approving etc. Bill of Exceptions.

The above and foregoing bill of exceptions or statement, is hereby approved, settled and signed as a true and correct bill of exceptions in behalf of plaintiff upon its application for a preliminary injunction.

Dated this 13 day of August, 1918.

FRANK H. RUDKIN,

Judge. [46]

Receipt of a copy of within statement admitted July 24, 1918.

WM. E. COLBY,
Attorney for Defendant.

[Endorsed]: Filed Aug. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

[Title of Court and Cause.]

Petition for Allowance of Appeal.

The above-named plaintiff Twenty One Mining Company considering itself aggrieved by the order made and entered by the above-named court in the above-entitled action on July 15th, 1918, wherein and whereby the above-entitled court denied the above plaintiff's application for the issuance of a preliminary injunction does hereby present this petition for the allowance of an appeal to the United States Circuit Court of Appeals, Ninth Circuit from said order, for the reasons set forth in the assignment of errors which was filed herewith; and prays that this petition for said appeal may be allowed and entered by this Court and transcript thereof together with all papers duly authenticated may be sent to the United States Circuit Court of Appeals, Ninth Circuit.

FRANK R. WEHE,
BERT SCHLESSINGER,
JNO. B. CLAYBERG,
Attorneys for Petitioner.

Appeal allowed and cost bond fixed at $300.00.

WM. C. VAN FLEET,
Judge.

Service of within Petition admitted 13th August, 1918.

WM. E. COLBY,
Atty. for Deft.

[Endorsed]: Filed Aug. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

[Title of Court and Cause.]

Assignment of Errors.

Now comes the plaintiff Twenty-One Mining Company and files the following assignment of errors upon which it will rely in its appeal from an order made in the above-entitled court on the 15th day of July, 1918, refusing to issue a preliminary injunction therein in favor of the above-named plaintiff and against the above-named defendant.

(1) The Court erred in refusing said injunction because the plaintiff, by the ownership of the surface of its mining locations, under which a vein dips extralaterally from the apex in adjoining ground, is given the right and title to each and every part of said mining claims including the surface thereof and everything beneath the surface, except veins which apex outside of such surface boundaries.

(2) The Court erred in refusing said injunction because the statutes of the United States only give to one pursuing a vein extralaterally of which the apex is within his ground, the right to follow said vein on its dip under the property or mining locations of any other person.

(3) The Court erred in refusing said injunction because the Act of Congress gives no right to the owner of any mining claim which includes the apex of a vein, to enter upon [50] the mining claim of another under which said vein dips extralaterally, either on or underneath the surface, or to remove any rock, earth or other part or portion of said mining claim.

(4) The Court erred in refusing said injunction because any act of defendant in going outside of the boundaries or limits of said vein extralaterally amounts to an invasion of the rights of plaintiff in and to its said mining claims.

(5) The Court erred in refusing said injunction because under the Act of Congress when plaintiff became the locator or holder of mining claims it owned everything beneath the surface of said claims, except such vein or veins lying thereunder, which apex outside of the surface boundaries of such claims.

(6) The Court erred in refusing said injunction because the Acts of Congress do not declare any exception of any property or right in a mining claim except the right, title and possession to veins lying underneath the surface boundaries thereof which apex outside of such mining claim.

(7) The Court erred in refusing said injunction because under the Acts of Congress the title to a mining location vests in the locator or holder thereof everything beneath the surface of such claims except only veins lying underneath said surface which apex outside of the surface boundaries of said claim.

(8) The Court erred in refusing said injunction because no right is given by the statutes of the United States, to the owner of the apex of any vein, to go outside of the boundaries or limits of such vein in the development, working or operation thereof at any point outside the surface boundaries of the claim in which said vein apexes dropped downward perpendicularly. **[51]**

(9) The Court erred in refusing said injunction because under the Acts of Congress the rights given thereby cannot be extended by construction to include anything except rights clearly given.

(10) The Court erred in refusing said injunction because there cannot be imported into the said Acts of Congress, a grant or the intent to grant any right aside from such rights as are therein specifically mentioned.

(11) The Court erred in refusing said injunction because the exercise of any acts or rights by the owner of the apex of the vein, while pursuing the same extralaterally under the surface of the property or locations owned by others, by which the property or rights of such other owner are interfered with or invaded, is the taking of private property without payment of due compensation in violation of the Constitution of the United States.

(12) The Court erred in refusing the said injunction because the going outside of the boundaries of the vein by working, developing or mining said vein extralaterally within the boundaries of property owned by a third person, is an invasion of the property and rights of such third person, and such third

person need not show any damages to prevent said invasion, other than those presumptively arising from the invasion of their rights.

(13) The Court erred in refusing the said injunction because it is alleged in the complaint on file herein and the affidavit of Frank L. Sizer filed in support of said complaint for the purposes of obtaining an injunction, that the defendant herein, will in the mining, development or working of said vein extralaterally and beneath the plaintiff's locations, go outside of the vein and make and create large excavations in the country [52] rock and earth beneath the surface of such location and thereby directly invade the property and rights of the plaintiff, and these allegations are not denied.

(14) The Court erred in refusing said injunction because it appears from the affidavits, pleadings and other papers filed herein that said defendant does not deny that it intends to go outside of the boundaries or limits of said vein while developing, working or mining the same extralaterally at points beneath the surface of plaintiff's locations, and make large excavations in the country rock belonging to plaintiff and lying underneath the surface of the said locations.

(15) The Court erred in refusing the injunction because in defendant's verified answer filed herein prior to said hearing, it is alleged that said defendant intends in the future working, development and mining of said vein under plaintiff's said mining locations to excavate and remove any and all rock and earth outside of the boundaries or limits of said vein

as may be reasonably necessary to the profitable and economical working of said vein.

(16) The Court erred in refusing the injunction because the defendant in its verified answer filed herein prior to said hearing alleges and claims that it has the absolute right to go outside of the boundaries or limits of said vein and excavate and remove whatever amount of country rock may be reasonably necessary or convenient to render profitable and economical the working, development and mining of said vein.

(17) The Court erred in refusing the said injunction because it appears from the pleadings and affidavits on file herein that the defendant intends in the future working, development and mining of said vein extralaterally, to go outside of and [53] beyond the walls and boundaries of said vein and excavate and remove rock and earth from the mining claims owned by plaintiff.

(18) The Court erred in refusing the said injunction because it appears from the pleadings and affidavits on file herein that defendant claims the right in working, development or mining of said vein extralaterally, to go outside of and beyond the boundaries and walls of said vein whenever and wherever it becomes convenient or necessary so to do for the purpose of profitably or economically mining, working or developing said vein.

(19) The Court erred in refusing said injunction because it appears from the pleadings and affidavits on file herein that defendant had theretofore made excavations and removed large quantities of rock

and earth from beneath the surface of plaintiff's mining claims, and had constructed and excavated extensive shafts, tunnels, cross-cuts and other workings, entirely away from and disconnected with said vein, and did not deny that it would do the same in the future if it was considered convenient and reasonably necessary to the profitable and economical working, development or mining of said vein.

(20) The Court erred in refusing said injunction because it appears from the pleadings and affidavits filed herein that the said defendant had theretofore excavated and removed large quantities of rock and earth from beneath the surface of plaintiff's said mining claims and had constructed and excavated extensive shafts, tunnels, cross-cuts and other workings entirely away from and disconnected with said vein and claimed that it had the legal right so to do.

(21) The Court erred in refusing said injunction because it appears from the pleadings and affidavits on file herein on behalf of plaintiff that defendant will in the future working, development [54] and mining of said vein extralaterally, not keep such working, development and mining within the boundaries thereof, but will go beyond and outside of said boundaries and extract and remove large quantities of earth and rock from underneath the surface of plaintiff's mining claim.

(22) The Court erred in refusing said injunction because it appears from the pleadings and affidavits on file herein that defendant claims the right to go outside of said vein and extract and remove all the

earth and rock underneath the surface of plaintiff's mining claim which it may consider to be reasonably necessary or convenient to the profitable and economical mining, working and development of said vein.

(23) The Court erred in refusing said injunction because the performance of the acts contemplated by defendant in the working and mining and development of said vein extralaterally, will invade plaintiff's rights and ownership to said mining claims so owned by it, which are guaranteed to plaintiff by the Statutes of the United States.

WHEREFORE, plaintiff insists that said order of said Court should be reversed and that said District Court for the Northern District of California, Second Division, may be directed to enter an order granting the issuance of said preliminary injunction in accordance with the application of plaintiff in that behalf and that plaintiff have such other and further relief as it may be entitled to in accordance with the law.

Dated this 12th day of August, 1918.

FRANK R. WEHE,
BERT SCHLESSINGER,
JNO. B. CLAYBERG,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 12, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

30779–18

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

Capital Paid in Cash $1,700.000. Total Resources over $3,000,000.

Home Office:
BALTIMORE, MD.

In the District Court of the United States in and for the Northern District of California, Second Division.

TWENTY ONE MINING COMPANY, a Corporation,

Plaintiff,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INCORPORATED, a Corporation,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Twenty One Mining Company, a corporation, as principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and having its principal place of business in the city of Baltimore, Maryland, as surety, are held and firmly bound unto the above-named Original Sixteen to One Mine, Inc., a corporation, in the sum of Three Hundred Dollars, to be paid to

the said Original Sixteen to One Mine, Inc., a corporation, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents;

SEALED with our seals and dated the 10th day of August, 1918;

WHEREAS, the above-named Twenty One Mining Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order dated July 15th 1918, rendered in the above-entitled suit, in the District Court of the United States for the Northern District of California, [56] Second Division;

NOW, THEREFORE, the condition of this obligation is such, that if the above-named Twenty One Mining Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

TWENTY ONE MINING CO.,
By L. A. MAISON,
Secretary.

UNITED STATES FIDELITY & GUARANTY COMPANY,
(Seal of U. S. Fid. & Guar. Co.)
By H. V. D. JOHNS,
By JAS. M. KENNEY,
Attorneys in Fact.

Approved:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed August 12, 1918. Walter B. Maling, Clerk. [57]

(Title of Court and Cause.)

Praecipe for Transcript of Record on Appeal.

To the Clerk of the Above-entitled Court:

You are hereby directed to make and prepare the record on appeal in the above-entitled cause from the order heretofore made and entered on July 15th, 1918, denying the application of plaintiff to issue a preliminary injunction in said cause, etc., and have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on the 11th day of September, 1918.

In preparing said transcript, it shall be made up of the following papers, to wit:

Bill of complaint,
Answer of defendant,
Plaintiff's bill of exceptions,
Assignment of errors,
Petition for allowance of appeal and allowance,
Citation on appeal,
Bond on appeal and approval,
Praecipe for transcript,
Certificate of clerk.

Dated this 21st day of August, 1918.

JNO. B. CLAYBERG,
FRANK R. WEHE,
BERT SCHLESINGER,
Attorneys for Plaintiff.

IT IS HEREBY STIPULATED AND AGREED, that the above and foregoing papers may constitute the transcript on plaintiff's appeal from the order of the Court denying its application for a preliminary injunction.

Dated August 21st, 1918.

JNO. B. CLAYBERG,
FRANK R. WEHE, [58]
BERT SCHLESINGER,
Attorneys for Plaintiff.
WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 2, 1918. W. B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk. [59]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing fifty-nine (59) pages, numbered from 1 to 59,

inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $34.80; that said amount was paid by the attorneys for the plaintiff; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of August, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk. [60]

[Title of Court and Cause.]

United States of America,
Northern District of California,—ss.

Citation on Appeal.

The President of the United States of America, to Original Sixteen to One Mine, Inc., Defendant:

You are hereby cited and admonished to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof pursuant to an order allowing an appeal made and en-

tered in the above-entitled action in which the Twenty One Mining Company is plaintiff and appellant and the Original Sixteen to One Mine, Inc., is defendant and appellee in said appeal, to show cause, if any there be, why the interlocutory order made and entered in said cause on the 15th day of July, 1918, refusing the issuance of a preliminary injunction in favor of the above-named plaintiff and appellant restraining the above-named defendant and appellee pending the suit, from excavating or removing any part of rock or earth beneath the surface of the Valentine and the Belmont Quartz Lode mining claims, in the working, development or mining extralaterally of a vein lying underneath the surface of said mining claims and apexing outside of said claims and in a claim belonging to said defendant [61] and appellee, should not be set aside, corrected and remised and why speedy justice should be done to the plaintiff the Twenty One Mining Company.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 12th day of August, 1918.

WM. C. VAN FLEET,
Judge. [62]

[Endorsed]: Eq. 410. United States Circuit Court of Appeals, Ninth Circuit. Twenty One Mining Company, a Corporation, Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Appellee. Citation. Service of Within Citation Admitted August 13th, 1918. Wm. E. Colby, Attorney for Defendant.

Filed Aug. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3205. United States Circuit Court of Appeals for the Ninth Circuit. Twenty One Mining Company, a Corporation, Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 27, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Title of Court and Cause.]

Stipulation Re Printing of Record.

IT IS HEREBY STIPULATED AND AGREED that in the printing of the record herein for the consideration of the court on appeal from the order denying plaintiff's application for a preliminary injunction, heretofore entered in the above-entitled cause, the title of the court and cause in full on all the pages shall be omitted except on the first page, and inserted in lieu thereof, "Title of Court and Cause"; that no verification included in

the record need be printed in full, but there be inserted in lieu thereof, "Duly verified."

All that part of defendant's answer commencing line 2, page 7 with the words, "By way of a further and separate answer to said complaint, defendant alleges:" down to and including the words, "at the trial thereof and testimony introduced directed thereto," lines 13 and 14 of page 19 of said Answer, shall be omitted from the printing of said record, because the same and the whole thereof, has been stricken out by order of the Court below.

Dated August 24th, 1918.

JNO. B. CLAYBERG,
FRANK R. WEHE,
BERT SCHLESSINGER,
Attorneys for Plaintiff.

WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendant.

[Endorsed]: No. 3205. In the United States Circuit Court of Appeals, Ninth Circuit. Twenty One Mining Company, a Corporation, Plaintiff and Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Defendant and Appellee. Stipulation Re Printing of Record. Filed Aug. 27, 1918. F. D. Monckton, Clerk.

No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY
(a corporation),
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC.
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

JOHN B. CLAYBERG,
FRANK R. WEHE,
BERT SCHLESINGER,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO.

terms of such decree, the appellee claims the right to develop, work and mine said vein at any and all points underneath the surface of the Belmont and Valentine mining claims, and intends so to do, and to commence such work immediately; that in the development, working and mining thereof, appellee will excavate and remove large quantities of rock and earth outside of said vein, and make large openings underneath the surface of said mining claims entirely outside of the limits and boundaries of said vein; that unless restrained, appellee will enter upon said claims underneath the surface thereof at points outside the limits or boundaries of said vein, and will take out, excavate and remove large quantities of earth and rock which are now the substance of said claims, and that appellant has no plain, speedy and adequate remedy at law. Appellant prays for a preliminary injunction which it asks to be made perpetual, upon the final hearing of the case (Record pages 1-7).

In support of the application for such injunction, appellant filed with said complaint the affidavit of one Frank L. Sizer, which after stating his familiarity with the premises in controversy, rehearses the existence of the vein as alleged in the complaint, and then sets forth that it appears by the workings on said vein formerly done by appellee underneath the Valentine and Belmont mining claims, that appellee has, in many instances, gone entirely outside and beyond the vein, and made large excavations under the surface of

these claims, which are then set forth particularly. The affidavit then sets forth that the vice-president of the appellee had theretofore filed an affidavit in the federal court in other litigation between the parties to this suit, stating that he had great experience in the development and operation of mines, and that it is a universal custom in following a vein, either horizontally or on the dip, to drive such workings on a more or less straight course, rather than to follow the undulations and rolls of the vein, so long as the workings keep in close touch therewith; that it would be a practicable and economical impossibility to follow all the sinuosities of the vein by keeping the working entirely within the vein, in case of sinking an incline shaft; that in sinking such shaft, nearly a straight course must be followed in order to make the shaft available; that where the general course of the vein changes abruptly, a change in the direction of the shaft then naturally follows, in order to keep in close touch with the vein; that in sinking the Sixteen to One shaft, the departure of the shaft from the vein was not greater than would be justified in economical and practicable mining.

Mr. Sizer's affidavit then sets forth statements in a like affidavit of one William D. Simkins, covering the same matters as included in the affidavit last above mentioned. Mr. Sizer then says that if the appellee follows the practice in which it had theretofore been engaged, wherever there is an undulation or wave in the vein, it will depart from

the vein and excavate its working entirely outside thereof and in the country rock, which is a portion of the substance of the Belmont and Valentine claims; that appellee, in a verified answer filed by it, in a certain action in ejectment, now pending in Sierra County, California, admits that it made all the excavations claimed by Mr. Sizer, and alleges that it had a right so to do, except as to a certain cross-cut 230 feet long, and 4x6 feet in size; that such excavations were made for the sole purpose of following the vein lying underneath the mining claims above mentioned, and to mine and remove the ore in the same to the surface, and that it was necessary and incident to a profitable and beneficial working of the vein to make such excavations (Record pages 17 to 24).

Thereafter, appellee filed its verified answer herein in which it is alleged that it is now engaged in working and mining said vein. It admits that appellee, in the future mining of said vein, intends to go outside the boundaries thereof, whenever and wherever necessary *"for the profitable and economical mining of the vein"* and asserts its rights so to do as incident to the ownership of the vein (Record pages 9 to 15).

Appellee filed with said verified answer, the affidavit of its vice-president, which sets forth practically the same facts (Record pages 27-32).

After the denial of appellant's motion for the injunction in the court below, appellee was given the privilege of filing certain other affidavits, which

are found in the record on pages 34 to 49 inclusive. These affidavits, in our judgment, except as hereinafter stated, are unimportant, because each and every one of them simply refer to and endeavor to justify the making of excavations by appellee before the institution of this suit, and which are involved in the action in ejectment in Sierra County, as above specified. It is however, important to notice that in none of the affidavits filed in behalf of the appellee, is there anything to show that the common practice of going outside the boundaries of the vein in certain instances, *was at points extralaterally on the vein beneath the surface of claims owned by third persons.*

We desire to call the attention of the court to the fact that nowhere in defendant's answer or affidavits, is it claimed or asserted by appellee that at any point on the vein underneath the surface of plaintiff's mining claims, will it be *necessary* for defendant to go outside the boundary of the vein, in pursuing it to its utmost depth. All that is claimed or asserted in behalf of appellee's right to go outside the vein, is that by so doing, it will be enabled to follow and work the vein more *"profitably and economically"*.

The answer and affidavits were adroitly drawn, and apparently so for the purpose of avoiding any direct allegation that it would be absolutely necessary in order to pursue the vein, to go outside thereof in some instance, and of leaving the inference that such necessity exists.

We desire to call the court's attention to paragraph X of the answer, which is as follows:

> "Defendant admits that if it be compelled to follow *all the sinuosities, curvatures and variations of said vein, and construct its work accordingly, and be compelled to depart from the running of straight workings, such as are customary, proper and reasonable in the conduct of mining operations, that it could not work said vein without the expenditure of large amounts of money which will be necessary to perform said mining and work within the straight and technical limits of the wall boundaries of said vein.*"

In paragraph XI of said answer, we find the following:

> "That it intends to remove such small quantities of barren and worthless country rock in the immediate vicinity of said vein in the walls thereof, *as may be necessary for the profitable and economical working of said vein*, and as may be reasonably necessary for such purposes, in accordance with the customs and usages of the art and science of mining under similar circumstances."

Aside from general denials of intention to work outside the vein, the above are all the allegations of the answer which bear upon the question now under consideration.

In the affidavit of S. B. Connor, it is stated:

> "That this defendant has no intention and will not depart from said vein in the prosecution of its work at any greater extent than herein specified, and with the utmost good faith, it has every intention of confining its working in the future *as closely as possible to*

the vein consistent with economical and profitable mining, and in accordance with the usages and customs of the art and science of mining" (Record page 30).

In the affidavit of Thos. A. Gill, we find the following:

"That it is of the utmost importance to keep the main working shaft of the mine on a constant grade or pitch, and that it would be *highly inadvisable and poor mining* to follow the broken and wavy course of the vein with the shaft, which constitutes the main artery of the mine" (Record page 35).

And again:

"That it is *safer* and *cheaper* to follow through country rock at a short distance beneath the vein, than to attempt to follow the undulations and faults of the vein" (Record page 36).

In the affidavit of Elisha Hampton, we find the following:

"That it is of the utmost importance to keep the main working shaft of the mine on a constant uniform grade or pitch; that it is advisable to depart from the course of the vein when found necessary to keep the shaft straight; that this practice *tends to efficiency and safety* in extracting and removing the ore; that in this case, it appears that the vein has faulted and broken, and that in his opinion, it would be *dangerous and highly inadvisable* to carry the main working shaft along the course of the vein; that where the vein is broken or where the country rock is softer, but more uniform, it is *good mining practice* to sink in the foot wall" (Record pages 37-8).

In the affidavit of Andrew C. Lawson, we find the following:

> "Based on his observations made in these mines (referring to mines in various countries) he states that it is common mining practice to keep the various mine workings as straight as possible *for economic reasons;* that where a vein has undulations and rolls it would be impossible in many instances and *highly impracticable from an economical standpoint to follow the vein with all its sinuosities and curvatures,* and that it is almost invariable mining practice to follow along such a vein in a mean or average direction as nearly as possible. In addition to the actual openings on the vein itself, there are other openings which are reasonably necessary for operating purposes. *A working run in the wall rock of a vein can usually be kept open with less expense because of the lesser amount of timbering required, than a similar opening following the vein where the quartz is broken through so that the selvage or gouge of the vein is encountered, for this is usually a zone of weakness, which requires additional support, and for that reason is frequently not so satisfactory for a permanent working"* (Record page 40).

In the affidavit of A. Werner Lawson, we find the following:

> "That the Sixteen to One vein both on its strike and dip, has many minor rolls and variations in direction, and also varies greatly in width in various parts of the mine, and there is faulting in places so that it would be a practical impossibility as well as a *great economical disadvantage* to follow the vein in all its variations and changes in course and dip with the main workings through which ore and waste has to be raised or conveyed on a track, and in the lowering of timber" (Record pages 41-2).

And further:

> "It is common mining practice to drive workings, especially permanent workings *immediately above or below the vein,* especially *where the country rock is hard,* and will stand without much timber" (Record page 42).

In the affidavit of M. C. Sullivan, after stating that it is common mining practice to cut ore chutes, pockets and other workings such as stations, in the immediate vicinity of the vein, says:

> "The departure from the vein to the slight extent there shown, was for the purpose of getting into the solid wall rock immediately underneath the vein *so that it will require less timbering,* and would *stand better as a permanent working"* (Record page 44).

And again:

> "To confine such workings to the vein itself, would be a practicable impossibility, and would *seriously hamper mining operations and cause an economical loss* which would be a great disadvantage to the Sixteen to One Company" (Record page 44).

In the affidavit of W. L. Williamson, we find the following:

> "That it would be poor mining to confine the shaft to the walls of the vein, and not in accordance with the customs of mining in depth; that it is of the utmost importance to construct and maintain the working shaft of a mine in a manner as direct as possible, and with few variations in grade. It is impossible to extract and remove the ore with *safety or efficiency* where the main shaft follows the irregularities of the vein" (Record pages 46-47).

And again:

> "Affiant further avers that such practice is further advisable where the foot wall of the vein is of softer material than the vein so that *it may be mined more cheaply,* or where the vein is irregular, faulted and broken, making it *dangerous and difficult to keep open.* * * *
>
> That where the vein is small, it is frequently necessary to cut into the foot wall to *obtain sufficient room and storage for loading ore onto the skips,* and that it is advisable and customary to make such cuts *underneath* the vein so that the loading may be done by gravity" (Record page 47).

In the affidavit of N. S. Kelsey, we find the following:

> "It is the common mining practice to run various workings of a mine, and particularly the shaft, so far as possible to strike a mean or average direction, and keep the workings continuing as straight as possible, *for economic reasons;* that if the shaft or other workings of a mine were to follow all the undulations and variations of the vein, the mine could not be worked *practically nor profitably,* and that it is considered proper and ordinary mining, to cut into the walls of a vein, especially where the vein is a narrow one, for the purpose of constructing ore pockets, chutes and stations" (Record page 48).

The court can readily see from the above quotations that appellee does not contest the right to the injunction on the ground that by its issuance, the working and mining of the vein underneath appellant's claims, will be prevented, because conditions in the vein render it impossible of working or mining without going outside its boundaries, but

contests its issuance on the ground only, that the vein can be worked more *"profitably and economically"* by going outside its boundaries in certain instances.

It is difficult to comprehend any equitable principle which would authorize a trespass upon, and invasion of appellant's property, simply because it would save money for appellee or render its vein more valuable.

Specification of Errors Relied Upon.

(1) The court erred in denying the preliminary injunction applied for by appellant.

(2) The court erred in making and entering the order of July 15th, 1918, denying a preliminary injunction against appellee as applied for by appellant (Record page 34).

The basis of these specifications of error may be found in appellant's assignment of errors (Record pages 54-60) all of which have been charged for the single purpose of raising the principal question on which we shall hereafter present our argument.

Argument.

It appears from the above statement of the case that there is practically no dispute as to the facts involved, and the question which is put clearly before the court for decision is:

HAS ONE, RIGHTFULLY FOLLOWING A VEIN EXTRALATERALLY BENEATH THE SURFACE OF CLAIMS OWNED BY ANOTHER, THE RIGHT TO GO OUTSIDE OF THE BOUNDARIES OF THE VEIN IN THE PROSECUTION OF HIS WORK.

We shall preface the argument with the following well-settled principles which should be borne in mind in the consideration and decision of the proposition involved:

1. A vein extralaterally belongs to and is a part of the location in which the apex thereof is situated.

2. By a valid location, a locator conditionally secures each and every right which would pass to him by a patent of the ground, except the bare legal title, which the government holds in trust for him, until patent is issued. It may be questionable whether a location can, under any circumstances, be considered a grant, because the term "grant" includes in its meaning passage of the full legal title. The full legal title to a mining claim does not pass until the patent is issued. It seems to be generally understood, however, that by a location one is given the permission to exclusively occupy, use and enjoy everything included in the location, and that this is a possessory right only, which cannot be taken away, even by the government, if the locator complies with the statute in performing the annual representation work. As to all third persons, of course, the rights given by a

location are tantamount to the rights given by a patent.

We also deem it important that we first present our views on certain other propositions which may or may not be contested. Such propositions are four in number, viz:

A. Wherever a legal right is about to be tortiously invaded, the owner thereof, in an application for its protection, need neither allege nor prove actual damages.

B. Where a legal right is sought to be protected by injunction against a tortious invasion, if the court below denies such injunction *as a matter of law,* the discretion of that court is not involved or exercised, and this court on appeal must determine whether the decision of the court below was erroneous as a matter of law.

C. That the doctrine of comparative injury has no application where the acts sought to be enjoined are tortious and amount to an invasion of a legal right, or where the court below decides the question purely as one at law.

D. Equity may be invoked to prevent an anticipated injury, especially where the allegations of the bill in regard thereto are not denied.

We shall therefore, present our views on these propositions as briefly as possible:

A.

"WHEREVER A LEGAL RIGHT IS ABOUT TO BE TORTIOUSLY INVADED, THE OWNER THEREOF IN AN APPLICATION FOR ITS PROTECTION, NEED NEITHER ALLEGE NOR PROVE ACTUAL DAMAGES."

We maintain the integrity of this proposition on both principle and authority, and contend that plaintiff being the owner of the Valentine and Belmont mining claims, such ownership includes everything beneath the surface of said claims, except veins which apex outside their boundaries, and that plaintiff is entitled to the exclusive possession and enjoyment thereof, under Section 2322, R. S. U. S.; that the subsurface of a claim is a part and portion of the substance of the claim, and that any trespass thereon by which any part of the substance of said claims is removed or destroyed is an invasion of plaintiff's legal rights from which irreparable damages will be inferred or presumed, and need not be alleged.

Heilbron v. Canal Co., 75 Cal. 426, (unlawful diversion of water);

Moore v. Massini, 32 Cal. 590, (Quarrying asphaltum);

Moore v. Clear Lake Water Co., 68 Cal. 146, (Unlawful diversion of water);

Vestal v. Young, 147 Cal. 721, (Changing location of ditch);

Richards v. Dower, 64 Cal. 62, (Excavating tunnel);

U. S. v. Guglard, 79 Fed. 21.

In the litigation between the Montana Company and the St. Louis Company no actual damages were alleged, and it appeared from the facts stipulated none could exist. The excavation of a tunnel, however, was enjoined.

St. Louis Min. Co. v. Montana Min. Co., 113 Fed. 900;

St. Louis Min. Co. v. Montana Min. Co., 194 U. S. 235.

B.

"WHERE A LEGAL RIGHT IS SOUGHT TO BE PROTECTED BY INJUNCTION AGAINST A TORTIOUS INVASION, IF THE COURT BELOW DENIES SUCH INJUNCTION AS A MATTER OF LAW, THE DISCRETION OF THAT COURT IS NOT INVOLVED OR EXERCISED AND THIS COURT ON APPEAL MUST DETERMINE WHETHER THE ORDER OR DECISION OF THE COURT BELOW WAS ERRONEOUS AS A MATTER OF LAW."

We submit that the rule adopted by this court upon the hearing of appeals from orders refusing or granting injunctions, that the determination of the court below being made in the exercise of its discretion, will not be interfered with on appeal, except for an abuse of discretion, is not applicable on this hearing. The court below *did not exercise any discretion,* but made its decision upon *a legal proposition alone.* Where no discretion is exercised and the order of the court appealed from is based upon a decision of law alone, the question to be considered by this court is whether or not the court below committed an error.

The word "discretion" has been considered in the case of *Hennessy v. Carmony,* 50 N. J. Eq. 616. The court say:

> "If, by 'discretion' is here meant that the Judge must be discreet and must act with discretion and discriminate and take into consideration and give weight to each circumstance in the case in accordance with its value in a court of equity, then that amounted to just what it was required to do in every case."

The court added:

> "But if the word 'discretion' in this connection is used in its secondary sense, and by it is meant that the Chancellor has the liberty and power of acting in finally settling property rights at *his discretion, without the restraint of the legal and equitable rules governing these rights,* then I deny such power."

The court say in *Hanover Star Milling Co. v. Allen & W. Co.,* 208 Fed. 513:

> "Though an order granting or denying a preliminary injunction will not be disturbed, except for an abuse of discretion, *a proper discretion does not include the misapplication of the law to conceded facts.*"

Citing:

> *Winchester Repeating Arms Co. v. Olmsted,* 203 Fed. 493.

It is said in *Samson Cordage Works v. Puritan Cordage Mills,* 211 Fed. 603:

> "The important question is whether its denial was clearly an improvident exercise of discretion; for the general rule governing the review of orders either granting or denying

> preliminary injunctions is, that the order should not be disturbed unless it clearly appears *that the court below has exercised its discretion upon a wholly erroneous conception of the pertinent facts or law.*"

In the case of *James v. Evans,* 149 Fed. 136, the action was for damages growing out of an alleged conspiracy between Freeman and James; the verdict was for damages against Freeman alone. James had judgment entered in his favor. Freeman made a motion for a new trial, which was granted; a motion was also made to strike James' judgment from the record, which was also granted. The court below held that the new trial applied to both Freeman and James on the ground that if there was any liability it was a joint one and existed against both Freeman and James.

The appellate court reversed the order striking the judgment from the record, and also the order granting the motion for a new trial, and says:

> "While it is a general rule that the allowance or refusal of a new trial rests in the discretion of the court and will not be interfered with on writ of error, it is well settled that this rule has no application where such allowance or refusal results from a clear abuse of discretion, and when a new trial is awarded solely *by reason of an erroneous opinion that under the pleadings the verdict could not, by any possibility, lawfully have been found,* there is in legal contemplation an abuse of discretion which can be corrected on a writ of error. In awarding a new trial necessarily involving and affecting the vacation and setting aside of a verdict and judgment in favor of James, *the court*

acted, we think, under a mistaken apprehension of the law, and its action in that regard was not had in the exercise of a sound legal discretion, but constituted reversible error."

In the case of *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399, there was under consideration an action by a widow for damages for the death of her son on account of negligence of the defendant. The testimony showed that at the time of his death the son was 29 years old, and earning $20.00 per week, most, if not all of which went to the support of the mother. The facts were not seriously disputed. After the jury were out some time, they came into court and reported disagreement, and asked if they might find a verdict for nominal damages, to which the court replied they were authorized to find a verdict to which they thought the plaintiff entitled. The jury returned and brought a verdict for plaintiff and fixed damages at $1.00. The motion was overruled and plaintiff excepted. The matter was taken to the appellate court on writ of error. That court says:

"It is a general rule that the granting of a new trial is a matter of discretion, and will not be reviewed, but it is not so when the verdict is inconsistent upon its face or shows an abuse of power on the part of the jury. *If the granting of the motion is a positive duty, it is not discretionary.* If it is necessary to correct a mistrial, it becomes a positive duty to set the erroneous proceedings aside and grant a new trial, and such, we think was the case when the jury found plaintiff was entitled to recover. If she was, it is absurd to say that she is entitled to only nominal damages. The

> conclusion seems unavoidable that the verdict was simply a compromise to prevent disagreement."

Memphis Railway Co. v. Illinois Railway Co., 242 Fed. 617.

In this case, the court says:

> "Notwithstanding the established rule that the granting or refusing of a new trial rests in the sound discretion of the trial court, and cannot be made the subject of review on writ of error, if as defendant claims, *a plain prejudicial error was committed* in the denial of a new trial, * * * it is proper that such error be considered."

Richards v. Dower, 64 Cal. 62, holds that cases of palpable legal error are excepted from the rule under which appellate courts decline to interfere with the granting, refusal, continuing or dissolving injunctions.

See also:

Louisville Tel. Co. v. Cumberland Co., 111 Fed. 663;

Kerr v. New Orleans, 126 Fed. 920;

Massie v. Buck, 128 Fed. 27;

Texas Traction Co. v. Collier, 195 Fed. 65;

Vogel v. Warsing, 146 Fed. 949.

Now applying these principles to the matter under consideration:

It is alleged in the complaint that appellee is about to commence the mining of a vein extralaterally which lies underneath the surface of the appellant's mining claims; that it will not confine

its workings within the limits of the vein, but will proceed outside the vein and make large and extensive excavations underneath the surface of appellant's mining claims, and remove the substance of the estate therefrom. Appellee in its answer alleges that it had commenced work, and that it would, in the actual mining of said vein, go outside the boundaries of the vein wherever and whenever necessary for the *profitable and economical* working of the vein. Thus the *question of law* came squarely before the court to determine whether the appellee has any right to go outside the vein and excavate, extract and remove parts or portions of the claims belonging to the plaintiff. If it has the right so to do, then the injunction should be denied. If appellee, under the mining acts of Congress, is confined to the limits of the vein itself in the working thereof extralaterally, it has no right to go beyond the vein, and appellant was entitled to the injunction. This was the sole and only question involved in the court below, as is fully shown by the bill of exceptions to the ruling of the court denying the injunction. It is recited in said bill:

> "That upon the hearing of the matter, counsell for plaintiff in response to an inquiry from the court, stated that the sole question involved and presented for determination, was whether in mining the Sixteen to One vein extralaterally underneath the surface of plaintiff's claims, the defendant was confined to working entirely within the walls of its vein, or whether it had the right to cut into the country rock on either side of the vein where necessary for its mining operations, either to keep its workings

straight and regular, as is customary in such operations where the vein undulates or is not direct, or where the vein narrows down to a width less than the convenient and ordinary width of the usual mining operations; plaintiff's contention being that the right of plaintiff was confined to operations entirely within the walls of the vein, and that those walls could not be transgressed, no matter how narrow the space. That upon this statement, the court without hearing from counsel for defendant stated that the application for a preliminary injunction would have to be denied. (Trans. page 33)

We submit that the court exercised no discretion in the matter at all, but decided that the fundamental legal principle upon which we based the right to a preliminary injunction, could not be sustained. No court can have any *discretion* in its decisions upon legal propositions. Any decision, whatever it may be, is correct or erroneous.

C.

"THAT THE DOCTRINE OF COMPARATIVE INJURY HAS NO APPLICATION WHERE THE ACTS SOUGHT TO BE ENJOINED ARE TORTIOUS AND AMOUNT TO AN INVASION OF A LEGAL RIGHT, OR WHERE THE COURT BELOW DECIDES A QUESTION AS PURELY ONE AT LAW."

We submit that the question of comparative injury or damages is never applicable or considered:

(1) Where the injunction is sought to prevent the unlawful invasion of a legal right.

American Smelting Co. v. Godfrey, 158 Fed. 238;

American Smelting Co. v. Godfrey, 158 Fed. 225-230;

Sullivan v. Jones, 208 Pa. State Rep. 540.

(2) Where the injunction is granted or refused *as a matter of law.*

Judge Sawyer in the case of *Woodruff v. North Bloomfield Gravel Co.,* 18 Fed. 807, states the rule with his usual precision and clearness as follows:

> "But we have nothing to do with this question as to the comparative importance of the conflicting interests or the inconvenience to the defendants by the stoppage of their works *if they infringe the material substantial rights of others. It is the province and imperative duty of the court to ascertain and enforce the legal rights of complainant no matter what the consequence to the defendant may be. This duty no court could evade if it would.*"

It seems settled where from the undisputed facts in the case the *tortious acts of a defendant will invade the legal rights of the complainant, the question of comparative injury will not be considered* (see Note 31 L. R. A. (N. S.) 881, 888 et seq.).

Judge Marshall in *McClerry v. Highland Boy Mining Co.,* 140 Fed. 951, says with reference to the assertion that comparative injury should always be considered upon an application for an injunction:

> "I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail.

> As a substitute it would be declared that private property is held on the condition that it may be taken by anyone who can make a more profitable use of it, provided that such person shall be answerable in damages to the former owner for his injury. In a state of society, the rights of the individual must to some extent be sacrificed to the rights of the social body; but that does not warrant the forcible taking of property from a man of small means to give it to a wealthy man on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy I think, is more concerned in the protection of individual rights, than in the profits to inure to individuals by the invasion of those rights."

In *Arizona Copper Co. v. Gillespie,* 100 Pac. 465, it was contended that the question of comparative injury should be taken into consideration. The court denied the contention and said:

> *"To withhold relief where irreparable injury is and will continue to be suffered by persons whose financial interests are small in comparison to those who wrong them, is inconsistent with the spirit of our jurisprudence of the state;"*

and added:

> "It is in effect saying to the wrongdoers, 'if your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less-fortunate neighbors'."

In *Wente v. Commonwealth Fuel Co.,* 232 Ill. 526 (83 N. E. Rep. 1049), it is said:

> "If the *existence of a private right and the violation of it are clear,* it is no defense to show

that a party has been to great expense in preparing to violate the right."

D.

"EQUITY MAY BE INVOKED TO PREVENT AN ANTICIPATED INJURY, ESPECIALLY WHERE THE ALLEGATIONS OF THE BILL IN REGARD THERETO ARE NOT DENIED."

Counsel for the appellee may insist that an injunction will not lie in this case under the allegations of the complaint, for the reason that such allegations do not show any present invasion of rights. We insist, however, that one of the strongest features of equity jurisprudence is its power to prevent anticipated action and threatened injury.

In the case of *Lake Erie & W. R. Co. v. Board of Commissioners,* 57 Fed. 945, it is held that it is not a defense to an application for a preliminary injunction that defendants have not already taken any action in the matter in which they sought to be restrained, when the bill charges that they intend to take such action unless restrained, and such allegation is not denied. In that case, a bill was filed to restrain the enforcement of a rate fixed by statute which specially charged the defendants with its enforcement. The defendant made no resistance to the granting of the preliminary injunction and filed no plea, answer or affidavit contradicting the allegations of the complaint.

In *Vicksburg Water Co. v. Mayor of Vicksburg,* 185 U. S. 65, the Supreme Court said:

> "It is further contended that this bill does not disclose any actual proceedings on the part of the city to displace complainant's rights under the contract; that mere apprehension that illegal action may be taken by the city, cannot be the basis of enjoining such action. and that, therefore, the Circuit Court did right in dismissing the bill. We cannot concede to this contention. It is often made in cases where bills in equity are filed to prevent anticipated and threatened action, but it is one of the most valuable features of equity jurisprudence to anticipate and prevent a threatened injury, were the damages to be irreparable. The exercise of such jurisdiction, is for the benefit of both parties in disclosing to the defendant that he is proceeding with the warrant of law, and in protecting the complainant from injuries, which if inflicted, would be wholly destructive of his rights."

Now, in this case, it is alleged in the complaint that the appellee will go outside the boundary of the vein and excavate and remove the substance of appellant's claims. This allegation is not only not denied in the answer, *but appellee alleges that it has already commenced work and claims the right to, and will in the prosecution of this work, go outside the boundary of the vein wherever and whenever it may be necessary to profitably and economically work and mine said vein.*

The doctrine for which we contend is sustained in the two cases of *St. Louis Min. Co. v. Montana Min. Co.,* 113 Fed. 900, and *St. Louis Min. Co. v. Montana Co.,* 194 U. S. 235.

These are the same cases heretofore referred to in this brief. There, the plaintiff did not assert

or claim that it would be damaged by the action of defendant in constructing its tunnel underneath their surface boundaries, but that made no difference with the decision of the courts.

Now taking up the important question on this appeal:

"HAS ONE, RIGHTFULLY FOLLOWING A VEIN EXTRALATERALLY BENEATH THE SURFACE OF CLAIMS OWNED BY ANOTHER, THE RIGHT TO GO OUTSIDE OF THE BOUNDARIES OF THE VEIN IN THE PROSECUTION OF HIS WORK?"

The right to follow a vein extralaterally, is given by Section 2322 R. S. U. S. That section provides that the location of a quartz lode mining claim gives to the locator

> "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically".

We contend that this section gives the following rights:

First. It gives to the owner of such location, the exclusive right of possession and enjoyment of the surface within the lines of their location.

Second. It gives to the owner of such location the exclusive right of possession and enjoyment of all veins, lodes or ledges throughout their entire

depth, the top or apex of which lies inside of such surface lines extended downward vertically.

Third. It gives to the owner the exclusive right of possession and enjoyment of *everything beneath his surface ground* except veins which apex outside thereof.

We presume counsel will concede the above propositions to be correct, except that it possibly may be contended that the owner of a valid quartz location is not given the rights to the extent above stated in the third subdivision.

The mining law of the United States is all comprised in one Act of Congress and Amendments thereto. All the sections and parts thereof are in *pari materia,* and should be construed together. Under the well-known principle of statutory construction, each section must be construed in harmony with the other section of the act, and such construction be placed thereon as will render the entire act harmonious. Now the right to a patent is based entirely upon the existence of a valid location. Nothing can be patented unless it is within the limits of a valid location and covered by Section 2322. Sections 2325 et seq. provide for the issuance of patents "for *land claimed and located for valuable deposits*". By patent from the government, the full legal title is given to the land within the boundaries of the location, including all veins, lodes or ledges which apex therein. If the land beneath the surface is not a portion of the

possessory rights gained by the act of location, it could not be patented.

The extent of the rights given to a patentee of a location made under Section 2322 has been passed upon by this court in the case of *St. Louis Co., v. Montana Co.,* 113 Fed. 900, and by the Supreme Court of the United States in the same case on appeal, 194 U. S. 235, and it has been held in both of these decisions, that such patentee is given the exclusive right of possession and enjoyment, not only of the surface and all veins which apex within its boundaries, but also of *everything beneath the surface,* except veins which apex outside thereof.

It is said by this court in 113 Fed. (supra) that

> "The mining laws as we construe them grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein."

Then after referring to Sections 2319 and 2325 of the statute, further says:

> "These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common law ownership. The reason for specifying in the description of the grant the 'veins, lodes and ledges' is for the purpose of defining what is granted in addition to the land, viz: the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim."

This court says in the same case that locators

> "are given the right to the possession of the surface and of *everything within their own*

claims, except the veins or lodes therein which may have their apices in the surface of another claim."

And again:

"It is true that the statute and patents thereupon issued confer upon the locators of a mining claim in terms only, 'the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location;' and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another."

It was contended in that case that the patent to the Nine Hour Claim only conveyed the surface of the claim, together with all veins, lodes or ledges having their tops or apices within the surface boundaries thereof, and that the underground portion of such claims aside from the veins apexing therein was still practically a part of the public domain.

On appeal to the Supreme Court of the United States, the same question was pressed upon that court by appellant. Judge Brewer says:

"Does the patent for a lode claim take the subsurface as well as the surface, and is there any other right to disturb the subsurface than

> that given to the owner of a vein apexing without its surface, by descending on its dip into the subsurface to pursue and develop the vein? We are of the opinion that the patent conveys the subsurface as well as the surface, and that so far as this case discloses, *the only limitation on the exclusive title thus conveyed, is the right to pursue a vein, which on its dip enters the subsurface.*"

Starting, therefore, with this proposition as established, we contend that by Section 2322, while one who owns a claim within which the apex of a vein exists, has the right to follow such vein on its dip beneath the property of others, this right must be confined to the vein itself.

Section 2322 in express language precluding the right of the owner of a vein extralaterally from entering upon the surface of the claim under which the vein dips, we contend that the same rights attach to the subsurface, and that if the statute prevents the entry upon the surface by express terms, it must be so construed as to equally prevent the entry upon the location beneath the surface, because both rights come from the same source, and are created by the same section of the statute.

This question is a cold, legal proposition, depending entirely upon the construction of Section 2322. If that section gives this right to the owner of a vein extralaterally, we are defeated in our contention. If, however, it does not give such right, we insist that our contention must be sustained, irrespective of the possible unpopularity thereof.

and irrespective of the monetary or other damages which may ensue to miners or mining companies. Section 2322 is the chart of all rights to located claims. It was enacted by the legislative branch of the government of the United States, and while it must be construed and applied by the courts, they have no right to invade the legislative functions of Congress and add any right not specifically specified, or in anywise or to any extent, extend the rights specified, although the existence of other additional and collateral rights might, in the mind of the court, be necessary to render the rights specified more beneficial.

The question of the right of one owning the apex of a vein to enter upon the underground parts of a claim into which the vein dips was first brought to the attention of Judge Knowles in the United States District Court, District of Montana, in the case of the Montana Company v. the St. Louis Company. In that case, the Montana Company owned the Nine Hour Mining Claim, and immediately to the northwest thereof and adjoining was situated the St. Louis Claim, which was owned by the St. Louis Mining Company. Within the boundaries of the St. Louis Claim there existed the apex of a vein, which on its dip passed underneath the surface of the Nine Hour Claim. The owner of the St. Louis Claim, for the purpose of "profitably and economically" working its vein on the dip beneath the surface of the Nine Hour Claim, started the excavation of a tunnel within the boundaries of the St.

Louis Claim, which on its extension would cross-cut its vein on the dip about 260 feet beneath the surface of the Nine Hour Claim. The Montana Company brought suit to enjoin the excavation of such tunnel, or the making of any excavations beyond the plane of the boundary line between the two claims. The facts were stipulated by the parties to the effect that no vein would be encountered in the course of such tunnel, under the Nine Hour Claim, except the vein, the apex of which was within the St. Louis ground; that such tunnel would not be run further than the point at which it cut through this vein on its dip, and would be used for no purpose except the working of that vein. In other words, the Montana Company voluntarily stipulated that it would and could not be actually injured or damaged by the construction, excavation or operation of the tunnel. It based its right to an injunction upon the ground that by the construction of this tunnel their rights of exclusive possession and enjoyment of the Nine Hour Claim would be invaded; that a portion of the substance of such claim would be excavated and removed therefrom; that the trespass in the use of the tunnel would be continuous, and that the St. Louis Company would eventually acquire a prescriptive right to that part of the Nine Hour Claim included in the tunnel. It was contended in behalf of the St. Louis Company that such injunction would not lie, because no damages could be shown by the Montana Company; that when the United States granted to the St. Louis

Company the right to follow the vein on its dip in the ground of another person, as incidental to that right, the right existed to mine such vein in a practical, profitable and economical manner, so long as such work would not injure anyone.

Judge Knowles held that by the construction or excavation of the tunnel the rights of the Montana Company to the exclusive possession and enjoyment of the Nine Hour Claim would be invaded; that the substance of their mining claim would be destroyed; that by the continued exercise of the right of maintaining the tunnel the St. Louis Company would eventually gain a prescriptive right to its maintenance and use, and that by Section 2322, the only right granted to the owner of the apex of a vein was the right to pursue or follow the vein itself downward. The St. Louis Company then appealed the case to this court (113 Fed. 900), which sustained Judge Knowles' ruling. That company then appealed the case to the Supreme Court of the United States (194 U. S. 235), where the decision of this court was affirmed.

This court held in effect, that the statute in express terms precludes the right of entering upon the surface of a claim under which the vein dips; that the same rights pass to the *subsurface* as to the surface. If the statute prevents the entry on the surface by express terms, it must be so construed as to equally prevent the entry upon the location beneath the surface.

This court stated the questions involved as follows:

> "The case involves the interesting question whether the owner of a mining claim, who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim, is confined in his right to operations within or upon the vein itself, and is without authority to otherwise enter the adjoining claim."

This identical proposition is involved in this case. *The extent* of the exercise of a right to go outside the vein, was evidently not deemed important by this court in that case, nor can it be of any importance for the reason that the extent of excavation beyond the boundary of the vein goes only to the degree of invasion of another's rights. The invasion is complete by going any distance beyond the vein, and must be protected to the same extent as though the excavations were made at great distances from the vein. This court in its opinion confines itself strictly to the consideration and decision of the question above quoted, viz., *Whether the right to follow the vein is confined within or upon the vein itself.*

Briefly stated, appellants' contentions in that case were, that the patent to the Nine Hour Claim simply conveyed the surface thereof and all veins having their apices within the boundaries thereof, and that since the mining law generally confers the right to explore and purchase the mineral land of the United States, appellants had the right to explore for their vein within the Nine Hour Claim,

so long as they interfered with no rights granted to the owner of the latter claim. That, if the patent to the Nine Hour Claim simply granted the surface thereof, and the veins apexing within its boundaries, then the right and title to the subsurface of such claim still remained in the government, and no objections could be made to any work being done underneath the surface of that claim, unless such work interfered with veins which had their apices within the surface boundaries thereof.

This court, after quoting the language of Section 2322, says:

> "But the appellants must find in the same statute the *full measure of their own right.* What are the rights that are given by the patent to the owners of the St. Louis Claim? They are given the right of possession of the surface and of everything within their own claim, except veins or lodes therein which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, *and they are given the right to follow outside their side lines and into adjoining claims, all veins, or lodes which have their apices in their own claims, so as to confer extralateral rights.* THIS IS THEIR RIGHT AND NO MORE."

Judge Brewer in the 194 U. S. 235, illustrates the conditions involved, by referring to the lines of a right angled triangle, taking the dip of the vein as the hypotenuse, the tunnel as the base line, and the boundary plane between the two claims as the perpendicular. He held that undoubtedly plaintiff was entitled to occupy the hypotenuse, because it owned the vein which created the same, and says:

> "May it also occupy the base line. Is it not *in pursuing and appropriating the vein, confined to work in and upon the vein,* or is it at liberty to enter upon and appropriate other portions of the Nine Hour Claim underground, in order that it may more economically reach and work the vein which it owns?"

The Supreme Court then holds that no such rights exist.

We submit that the order of the court below denying the preliminary injunction should be reversed, and that court directed to order its issuance in accordance with the prayer of the complaint.

Dated, San Francisco,
October 5, 1918.

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